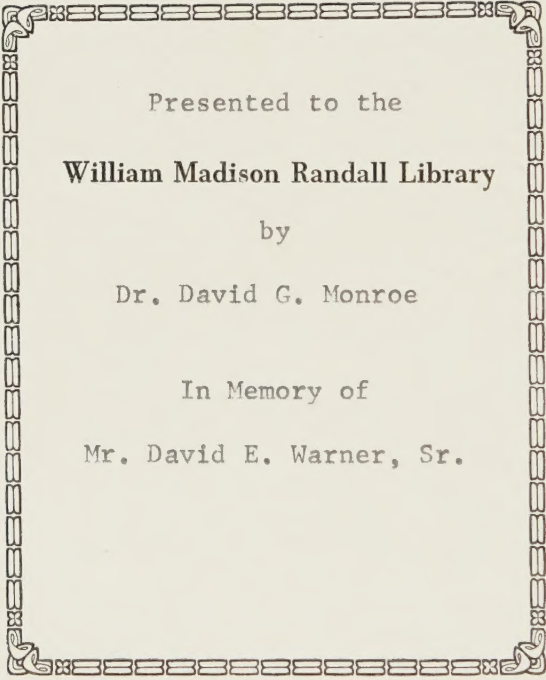


CONSTITUTIONAL LAW

MORRIS D. FORKOSCH



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CONSTITUTIONAL LAW

By

MORRIS D. FORKOSCH

Professor of Law, Brooklyn Law School

Brooklyn

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To the Memory
of
My Wife

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PREFACE

This volume is not designed to probe into the mysteries of the genesis and evolution of our federal Constitution. It is intended as an introductory tool for those interested in the field of federal constitutional law. This tool should thus be utilized to provide an initial understanding of our supreme law, but geared to the special requirements of students. This is the reason why repetition, for emphasis and understanding, is used. The analysis adopted is a combination of the plan found in the Constitution together with a functional approach.

Since it is the federal Constitution we study, we start immediately with it. That document is examined briefly and historically in the first Chapter, so that we understand what follows. The power-limitation concept is not new, of course, as any reader of Cooley's famous work knows. We then ask which department of the three co-equal federal ones will be more equal in the interpretation of the Constitution. And if this power of binding interpretation is lodged in one department then how, when, and under what conditions (*i.e.*, limitations) will it be exercised? This is the subject-matter of Chapter II.

Once this political-judicial Rubicon is crossed, and the federal system and the amending process is examined, we enter upon the judicial interpretation of the Constitution and its clauses. There is no logical requirement which compels us, for purposes of analysis, to place this "statute" in a classification different from that of any other statute enacted by federal or state legislatures—, save, of course, that it is the supreme law. But the logic of the situation enables us to understand that a written constitution is "merely" a statute enacted by the people, whereas a legislative statute is enacted by the representatives of the people. And since we thus engage in statutory interpretation, albeit a written constitution is our statute, the reader need have no fear in making up his own mind and disagreeing, if he is so inclined, with others as to such an interpretation. Canons of interpretation may or may not be used in so doing.

With this background we turn to the scheme of the Constitution itself for our further study, in Part B, of powers and limitations. We devote eight Chapters to a detailed analysis of the federal powers, one to the states' powers, and a final one to limitations and the federal-state conflict. The balance of the volume treats of the rights of persons as against the two sovereign governments, and whereas the Commerce Clause has been seen to be the greatest single peacetime source of federal power, especially as against the states, we now see that the Due Process Clause is the greatest

PREFACE

single peacetime limitation upon the states insofar as the rights of persons are discussed. The summary of contents permits one to understand the overall approach, and the extended Table of Contents permits the intensive examination of each Chapter to be better understood.

Throughout the volume certain questions arise and are either answered by reference to decisions of the Supreme Court or else logical corollaries therefrom are suggested. Some of these questions are: Within the federal government, what is the quantitative and qualitative division of power among the departments? What are the limitations upon each department's exercise of such powers? What of the federal and state governments *vis-à-vis* their respective powers and limitations? How are the internal federal, and the federal-state, relations resolved? Especially the latter? All these questions, and many more, are, in effect, the subject-matter of Parts I and II, although not completely so. But note that in these Parts we treat of governments primarily, not persons. This brings up the third Part of the volume, namely, the rights and obligations of persons between and among themselves, as against the states, and as against the federal government. These rights may be spelled out constitutionally and judicially, insofar as the Supreme Court has answered, or indicated an answer to, them. In many instances, however, an area of gray, or ambiguous doubt, remains in all three Parts, and it is here that lawyers, students, and the courts must reason together.

This, in brief, gives the purposes and the methods of this work. No new roads are uncovered, no new fields are explored, and no discoveries are announced. The coverage is purposely not complete, for other courses offer intensive analyses, *e.g.*, taxation, conflicts, labor law. However, because of the importance of administrative law, a chapter has been devoted to the constitutional aspects of its proceedings, albeit this subject also is not treated in detail. The volume is basically expository and pedagogical, and it is hoped it will be accepted and utilized as such.

A work such as this is the distillation of the teaching of many classes over the years. To thousands of students, therefore, go my thanks, and particularly do I appreciate the aid of my colleagues, Professors John C. Doyle, Milton G. Gershenson, and Clark Miller, who read and advised on the manuscript. Needless to say, the author alone is responsible for all errors of omission and commission, and will be grateful to those who call these to his attention.

Brooklyn, New York
December, 1962

MORRIS D. FORKOSCH

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CONSTITUTIONAL LAW

Part A

THE FEDERAL SYSTEM

Chapter I

BACKGROUND AND ANALYSIS OF THE CONSTITUTION

§ 1. Introduction

The federal Constitution was not struck off and handed down from on high. It was fashioned in a particular era, by fallible humans, who desired certain ends. They sought to achieve these ends by means of a collective or central government. A prior means, the Articles of Confederation, had been initiated in 1778, and the experience of almost a decade under it determined, in a degree, the outline of the new 1787 Constitution. But even before the Articles there had been influences shaping the American mind, and these forces likewise determined, in a degree, the subsequent documents. The interpretation of the pre-Revolutionary scene is not here attempted, nor is the American Revolution analyzed;¹ rather, and primarily for the purpose of later understanding, certain historic facts, and not their causes or meanings, are given.

§ 2. The General Background of the Constitution

The colonists engaged in two revolutions, the first to determine whether there should be any rule from abroad, and the second to determine who should rule at home. The first revolution, that of 1776, was highly successful, and this despite the later War of 1812; when the Peace Treaty was signed in Paris in 1783 the colonies had finally won their political freedom from England. But even before all this the second revolution had begun (and, from one point of view, is still with us). In May of 1776 the Sec-

1. For bibliographical references to these periods see National Council for Social Studies, Interpreting

and Teaching American History (1961) Chaps. II, III, and IV.

ond Continental Congress advised the colonies to form new governments, and on June 7, 1776, Richard Henry Lee of Virginia submitted three resolutions. The first called for a declaration that "these United Colonies" were free, and the third asked that "a plan of confederation" be prepared and sent to the Colonies for approval. The Declaration of Independence of 1776 followed but a month later. That document found it "necessary for one people to dissolve the political bands which have connected them with another," and so "the Representatives of the United States of America . . . in the name, and by authority of the good people of these colonies," declared that they were "free and independent states"

The "United Colonies," or the "United States of America," were loosely committed to a form of combined action to wage war against England, and a more definitive form of central government was apparently desired. The third resolution of Richard Henry Lee provided for this, but it took one year and five months before the "Articles of Confederation and Perpetual Union" were sufficiently agreeable to be adopted. Even then it was not until March 1, 1781 that Maryland, the last state, signed, albeit for commendable reasons it had earlier refused.

§ 3. — The Articles of Confederation—Digested

The document of November 15, 1777 opened by stating that it was "the Delegates of the United States of America in Congress assembled" who did "agree to certain articles of Confederation and perpetual Union". This agreement was expressed in thirteen Articles. The first gave "this confederacy" the name of "The United States of America." The second, in full, was: "Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."

Art. III bound the states into a firm league of friendship; IV gave to the "free inhabitants" of the states "all privileges and immunities of free citizens in the several states," and gave to "the people of each state" freedom to travel anywhere, enjoy certain privileges, etc.; the Article also contained an extradition paragraph as well as one which read: "Full faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state." Art. V provided for the election of delegates to the Congress, each state having only one vote, however, and Art. VI contained five paragraphs of prohibitions upon the states. Art. VII granted the state legislatures the power to appoint colonels and officers inferior to them in any land forces raised by the states.

Article VIII required all charges of war and other expenditures incurred by the national government to be defrayed out of a common treasury supplied by the states in proportions to be determined by Congress but levied by the states upon land and improvements. In Art. IX, the lengthiest one, were found the general and specific grants of powers to the central government, as well as certain limitations. The second paragraph provided that Congress "shall also be the last resort on appeal in all disputes and differences . . . between two or more states" in disputes "concerning boundary, jurisdiction or any other cause whatsoever," and then detailed at great length the procedures for such a determination. Art. X gave to a Committee of the States (or a majority of nine) authority, during any recess of Congress, to execute that body's powers, and Art. XI opened the door only to Canada to join. Art. XII validated all debts of the prior Congresses and made them a charge against the new government, and Art. XIII pledged each state to abide by the determinations of the united group, made the union "perpetual," and permitted amendments only upon unanimous consent.

§ 4. — — Analyzed

The primary fact emerging from a reading of the Articles of Confederation is that it was the states, through their delegates, which were agreeing, and that the central government was dependent and impotent. In literal effect the states retained "every Power, Jurisdiction and right" which was not "expressly delegated," and even those powers so granted were few. Nevertheless, a start toward federalism, i. e., a distribution of powers between governments, had been made. However, the newly-created federal government was merely a legislative body. There was no executive or executive department, and no judiciary or judicial department (save insofar as Congress would adjudicate differences between two or more states). Enforcement was lacking for its decrees, and even the financial wherewithal for its own daily existence was non-existent.

The situation may be described as one in which each state generally had a tripartite form of government composed of a legislature, an executive, and a judiciary, but in which the first was usually the dominant factor; this state government was an independent entity, i. e., it had 100% of a sovereign's powers although closely linked with the other states. The distribution of these 100% sovereign powers among the three state departments or branches was not detailed or expressed. Each state had named delegates or representatives to the Continental Congresses, and these delegates of the several and "united" states had agreed to the new Articles. Each state now delegated or surrendered a certain few of its sovereign powers to the new central govern-

ment, and further agreed to be limited slightly in its remaining powers. Additionally, the federal government was itself limited either expressly or because of the retention of powers by the states, and internally limited because of the form of (purely legislative) government imposed upon it, its inability to impose or collect funds, etc.²

Although the state's powers may initially be expressed as 100%, those delegated or surrendered to the federal government cannot be so quantitatively given, which resulted in an indefinite remainder being left in the granting state. The result of these grants (and limitations) was an ambiguous federal-state power area without a method for defining and settling "disputes" save by the consent of the state(s). In the nature of things, such consent would not be given and the federal government was logically and theoretically doomed from its inception.

§ 5. — — Experience Under

Between November 15, 1777, when the Articles were proposed, and February 21, 1787, when the federal Congress invited the several states to send delegates to a "revising" convention, nine years and three months of central experience had provided the base upon which the new Constitution would be written. What was this experience? There was, for example: the feeble attempt by Congress to regulate and control the land areas and fur trade to which it fell heir with the termination of the war in 1783, although recognition of the great and enlightened colonial policy embodied in the Northwest Ordinance of 1787 must be made; the inability of the United States to prevent Canadian breaches of treaty obligations involving the fur trade with the Indians of the Northwest; the inability of the United States to conclude commercial treaties with other nations; the impotence of our diplomats abroad when dealing with the great powers, e. g., the 1783 Orders in Council by which England excluded American vessels from Canada and the West Indies; the apparent impossibility of amending the Articles; and most importantly, the internal conflicts. These domestic problems stemmed in large measure from the weakness of the central government under the Articles. States did not honor requisitions from Congress, and Robert Morris, the finance minister, resigned because of possible impending bankruptcy; federal and state paper money was printed and repudi-

2. Besides these federal and state powers and limitations, there was also an indirect source of power granted to the federal government through a limitation upon the states. For example, in Art. VI, par. 2 prevented two or more states

from entering into compacts without the consent of the Congress. Since there were no words of limitation upon the granting of such consent, Congress might therefore assent without or with conditions.

ated in whole or in part;³ debtors pressed states for "stay laws" and other special legislation; landowners and merchants were threatened economically and even physically; in Massachusetts, in the fall of 1786, civil war finally broke out, and "Shay's Rebellion" conjures modern images of a like uprising of armies to prevent judgments and foreclosures against them for debt.⁴ The terrible despair which engulfed the nation brought fears of internal disintegration and foreign intervention. During this period, upon Virginia's initiative, delegates from Virginia, Delaware, Pennsylvania, New Jersey and New York⁵ met at Annapolis, Md., on September 11, 1786, the original background for the meeting involving disputes over the navigation on the Potomac River, but the powers now granted these representatives enabling them "to consider how far an uniform system in their commercial regulations and other important matters, might be necessary" (New Jersey's). Because of "so partial and defective a representation," the Commissioners under date of September 14th, reported that it was felt advisable "to effect a general meeting of the States, in a future convention," at which time "a corresponding adjustment of other parts of the Foederal System" might be made. This adjustment involved "important defects" which were "acknowledged" by the states in the basis for the instant conference, and it was suggested that a convention be called to meet at Philadelphia in May of 1787 "to take into consideration the situation of the United States, [and] to devise further provisions as shall appear to them necessary to render the constitution of the Foederal Government adequate to the exigencies of the Union" ⁶

§ 6. — — The Constitutional Convention of 1787

The Report of September 14, 1786 was forwarded by the Commissioners to Congress which, on February 21, 1787, invited the states to send delegates to Philadelphia on May 14th "for the sole and express purpose of revising the Articles of Confederation" ⁷ The states (except for Rhode Island) chose a total of 74 representatives, but only 55 gathered, and of these only 39 signed the Constitution; in the 55 there were five who had been

3. Art. IX, § 4, gave Congress "the sole and exclusive right and power" of regulating the content and value "of coin struck by their own authority, or by that of the respective States" Art. VI did not prohibit the states from emitting paper currency as legal tender.

4. See, e.g., *Home Building & Loan Ass'n v. Blaisdell* (1934) 290 U.S. 398, 427, 453-458, 54 S.Ct. 231, 78 L.Ed. 413.

5. Commissioners were also appointed by New Hampshire, Massachusetts, Rhode Island and North Carolina, but none attended.

6. Commager, ed., *Documents of American History* (3d ed., 1947) pp. 132-134.

7. Farrand, *Records of the Federal Convention* (1911) III, 13.

Commissioners at Annapolis the preceding year, and about 30 of the 55 were lawyers.⁸ Various "plans" were presented to the Constitutional Convention of 1787. The Virginia Plan of May 29th opened with the resolve "That the Articles of Confederation ought to be so corrected and enlarged" as would enable the government to accomplish its objects; the New Jersey Plan of June 15th opened with almost the same language; the Hamilton Plan of June 18th, however, did not mention revision or correction. Notwithstanding all three Plans proposed a tripartite form of central government, with a separate department or branch of the legislature, the executive, and the judiciary, and in effect went far beyond any "sole and express purpose of revising" Regardless, and "acting in technical excess of its authority," the Convention "proceeded to frame for submission to the people of the several states an entirely new Constitution."⁹ The document which evolved was subscribed after a last paragraph which opened, "Done in Convention by the Unanimous Consent of the States present . . . ," while the opening paragraph began "We the People of the United States," and the final Article of the Constitution provided for adoption when ratification "of the Conventions of nine¹⁰ states" occurred. According to Chief Justice Marshall, and regardless of any usurpation of authority, the people and not the states gave life and power to the new government,¹¹ and this even though the margin of ratification in the important states was so small that it has been suggested that a popular referendum in 1789 would have defeated the proposed government. But, as Benjamin Franklin conceded in his speech on the closing day of September 7, from a group of men of such diverse backgrounds no "perfect production" could be expected; that he was astonished "to find this system approaching so near to perfection as it does;" and that while "I confess that there are several parts of this Constitution which I do not at present

8. The economic, political and other backgrounds of the participants is not here of moment. See, for contrasting views, Beard, *An Economic Interpretation of the Constitution of the United States* (1925) p. 11, who feels the Constitution was primarily the product of a group of economic interests expecting beneficial results therefrom, and Brown, Charles Beard and the Constitution (1958) and McDonald, *We the People* (1958), who reject this thesis.

9. Mr. Justice Sutherland, dissenting, in *Home Building & Loan Ass'n v. Blaisdell*, supra note 4, at p. 459.

10. The Articles of Confederation provided for unanimous consent so

that, as Madison phrased it, "On what principle . . . [can] the solemn form of a compact among the States . . . be superseded without the unanimous consent of the parties to it?" His answer was "the absolute necessity of the case; . . . the great principle of self-preservation; . . . the transcendent law of nature and of nature's God" He also suggested that "mere legislative ratification" of the Articles was not the "higher sanction" which now was to be required of "We the People." See *The Federalist* No. 43.

11. *McCulloch v. Maryland* (1819) 4 Wheat. 316, 405, 4 L.Ed. 579.

approve, . . . I am not sure I shall never approve them." Thus he consented "because I expect no better, and because I am not sure that it is not the best."

§ 7. The Constitution and Theory—Concept of Three Constitutions

The document proposed by the Philadelphia Convention of 1787, and thereafter, ratified ¹² by state conventions chosen by the people, is generally called the federal Constitution. Some writers speak of this as the "one" Constitution, claiming that amendments to it do not nullify but merely add to or subtract from it. Other writers speak of "two" Constitutions, holding that the original document is the first, and that later Amendments are to be treated separately. Still other writers feel that there are really three Constitutions, namely, the original document, then in a second category the first ten Amendments of 1791, popularly called the Bill of Rights, and in a final third grouping are found the Civil War Amendments, especially the Fourteenth, which is (are) held to be the base for a third Constitution. Regardless, and for simplicity, we treat the 1789 Constitution as the one so to be termed, and will speak of the Amendments as such.

§ 8. — Federal and State Powers—In General

While the Constitution might have been the initial product of the states it was the legal and factual creation of the people, through ratification and adoption. The preceding sections have disclosed that under the Articles of Confederation the states, as sovereigns, surrendered some powers to the federal government, although quantitatively there could be no assessment of how much was granted or how much was retained (see § 4, *supra*). But now, if "We the People" had created the federal Constitution, had they not previously also created the individual states? So that one consequence of having one source lake with two emptying streams is to raise the question of how much water feeds into one or the other or both, and how much is retained; and a corollary question is, what kind of water empties into each stream and what kind is retained? Questions of quantity and quality are not answered in the federal Constitution, just as previous § 4 could not answer for the Articles of Confederation. However, under the Articles, as seen in that section, the distribution of powers emanated from a state's own desire to grant, withhold, or otherwise control, so that

12. Ratification by the ninth state did not signify the commencement of the new government, for the approvals had to be reported to the old Congress which thereupon, in the fall of 1788, passed a resolu-

tion appointing the first Wednesday of the following March as the day "for commencing proceedings under the Constitution." See, on this, *Owings v. Speed* (1820) 5 Wheat. 420, 5 L.Ed. 124.

the federal government was beholden to the states initially and continually. Further, limitations upon the power of the federal government to act had been imposed, even though limitation upon the states also appeared. Under the new Constitution, therefore, the basis for the federal power no longer was the state but the people. And since it was the people who held all power, they could and did grant portions of their entire power to each government, but also withheld some for themselves.

Did this make the formerly sovereign states no longer sovereign? Did it transfer sovereignty to the federal government? Or did the people retain this sovereignty? The answer is that a distribution of sovereign powers occurred, with certain aspects of sovereignty lodged in the federal government, others in the states, and some even may be in the people. There is no unitary government in this country, and there is no one sovereign power. In theory the people have the ultimate power to do as they desire; in practice there are two governments, both supreme within their fields, and yet both limited. They both draw their powers from the same source, but their limitations are to be somewhat differently considered. One source of limitations is the people, that is, the source for the power is also the source for the limitation, and these latter are found particularly expressed in the Constitution. But another source of limitations stems from the fact that when a power is lodged completely in the federal government, for example the power to declare war, then to that extent this is a limitation upon the states. And, further, when a power has not been granted to either government, then both are limited because the people apparently have retained it. If we look at the Tenth Amendment to the federal Constitution we can see that, in theory, the preceding approach is not incorrect. That Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

There is, however, one gap in the reasoning to this point. We have said that the people have all power and have granted and limited these to both governments. In the Constitution we can read, in general and in particular language, what powers have been granted and limited to the federal government; but where is there any like grant of powers to the states? Limitations upon the states are found, but any series or list of grants is missing. Where, therefore, can the states look for powers? The answer will provide a clue to the later analysis of certain decisions. And this answer begins with the states which have never lost their status as such. Before the Articles, before the Constitution, and to the present, the states existed as such, and have never lost their (now limited) sovereignty. In effect, if we may return to the lake and the streams, there has always been one source lake, and originally

there was only one stream. The waters flowed down this stream but the source never dried. Later, a second stream was begun (whether by the first stream's action or that of the lake being now immaterial), but the waters never stopped flowing in the first. All that happened was that the source diverted water from the first, (perhaps) added from its own reserved waters, and poured this all into the second. Thus the states did not require any grant of powers, as they already existed and had these powers; the newly-created federal skeleton, however, had to be fleshed out.¹³ The states, by virtue of their continued existence and (now limited) sovereignty have a variety of powers not taken from them, for example, control over the family and matrimonial status of people, the supervision of ordinary business and religious corporations, and the greatest power of all, the "police power." To the extent and degree that states have these powers exclusively, and are not otherwise limited, the federal government is thereby limited just as are the states under the war power mentioned in the preceding paragraph.

The preceding analysis permits us to speak of powers which are granted to the federal government for its sole and exclusive exercise, e. g., the power to declare war, of powers "granted to," i. e., retained by, the states exclusively, e. g., purely and solely intrastate commerce as later discussed, and also of powers which both governments might exercise concurrently, e. g., the taxing power.¹⁴ And we can also note that, because of these many ambiguities, there is no clear-cut granting of powers to either government or of retention by the people or the States. In other words, if it is the people who have 100% of the powers initially, then have they granted 40% to the federal government, permitted the states to keep 45% and retained 5% for themselves? Or are the percentages 60-30-10? Or what? And to further complicate the picture, the Constitution's clauses are not simple and free of ambiguity, provide much room for differences, and require needed policy interpretation. Furthermore, depending upon how strictly or loosely the Constitution is interpreted to grant, withhold, or limit powers, the percentages may vary from generation to generation, and also from person to person within each generation.

13. See *United States v. Curtiss-Wright Export Corp.* (1936) 299 U. S. 304, 316, 57 S.Ct. 216, 81 L.Ed. 255: "[T]he primary purpose of the Constitution was to carve from the general mass of legislative powers then possessed by the states such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the

states" [This language is here applied to Art. I, § 8 of the Constitution.]

14. This, as Prof. Dodd points out, is a dangerous division or classification, *Cases and Materials on Constitutional Law* (5th ed., 1954) p. 422, and is therefore not to be used save for purposes of pedagogy.

§ 9. — The Doctrine of the Separation of Powers

The political theories of English and Continental philosophers were known to the educated colonists. In addition, those who assumed leading roles in the post-Revolutionary years had read ancient history, were familiar with the pitfalls of direct and representative governments, and had before them their own experiences. Included in these experiences was the immediate past decade during which many states had drafted new constitutions. Even before the Declaration of Independence was signed, and on May 10, 1776, the Second Continental Congress, by resolution, advised the colonies to set up new governments.¹⁵ Between June 29, 1776, when Virginia accepted its new constitution, and through July 8, 1777, when Vermont did likewise, none of the colonies so complied; South Carolina and New Hampshire re-drew their constitution of January and March 1776, and the rest followed. The Massachusetts Constitution of 1780 enunciated explicitly what all these constitutions accepted in theory, and either wholly or partially adopted, namely, the concept of the separation of the total powers which a government had, these being termed respectively the legislative, the executive, and the judicial powers.¹⁶ This tripartite form of government, with each branch having its independent powers, was thus available, had been lived under, and was simply and naturally adopted. Additionally, the delegates to the 1787 Convention were fearful of providing overmuch of power to any one body, for in their own lifetimes they had felt the effects of this monolithic despotism abroad and at home. The doctrine was thus adopted "not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid frictions, but, by means of the inevitable friction incident to the distribution of the governmental powers among the departments, to save the people from autocracy."¹⁷

15. The order of the day was a written constitution, for the colonists had experienced a rather difficult period under the English form of government. The concept of a "government of laws and not of men" thus has a background of a fear of arbitrary power being exercised by uncontrolled delegates, so that the nullification of powers which are not reasonably circumscribed is understandable. In general see Forkosch, *Administrative Law* (1956) §§ 80-86.

16. "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them; the executive shall never exercise the legislative and judi-

cial powers or either of them; the judicial shall never exercise the legislative and executive powers or either of them; to the end that it may be a government of laws and not of men." Additionally, there were internal "checks and balances" upon these departments, e.g., a council checking the governor, the senate doing likewise for the house. In general, see Morison & Commager, *The Growth of the American Republic* (1942) I, 231-240.

17. Brandeis, in *Myers v. United States* (1926) 272 U.S. 52, 293, 47 S.Ct. 21, 71 L.Ed. 160. See also Frankel, *After Krushchev*, N. Y. Times Magazine, March 4, 1962, p. 15, where he discusses the post-Stalin collaboration and rule "by a

The Constitution impliedly embodies this principle of the separation of governmental powers by creating, in the first three Articles, a legislature, an executive, and a judiciary. In the opening three words of each Article's first section the whole power there granted is lodged in that branch, e. g., "All legislative powers herein granted shall be vested in a Congress" Nevertheless, this maxim does not require each branch to "be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments" ¹⁸ The totality of the federal government's powers is therefore to be found within these three branches, but this does not mean that each branch has received one-third of all the governmental powers granted in the Constitution. For example, in § 4 and especially in § 8, *supra*, it was seen that a percentage distribution of powers was there impossible; so, too, here. The percentage distribution of powers amongst the federal government, the states, and the people may, for purposes of present analysis, be said to be 80-15-5, but the question here is, how is the federal 80% re-distributed amongst its own three branches? Does the legislature have 40%, that is, one-half, and the executive and the judiciary each have 20%, that is, each have one-quarter? This distribution accounts for the entirety of the federal 80% powers assumed to have been so granted, but it is an assumption which cannot be proved. For, as in § 8's last paragraph, the Constitution's clauses are ambiguous and require interpretation; additionally, in time of war or an emergency there is a looseness in interpretation to permit the successful outcome of the nation's efforts, as well as a delegation by one or both branches to the other.¹⁹ Under the separation doctrine, therefore, the entirety of the federal powers may be lodged in the three branches of the government, but the powers of each branch vis-a-vis the others cannot be definitely and finally known.

§ 10. — The System of Checks and Balances

The separation doctrine does not require that the three branches be restrained from penetrating their neighbor's domain. This, in a sense, permits one department to check on the other and

committee of a few but decidedly separate individuals and power groups. It reflected a realization that the best protection against arbitrary power lies in the division of power"

18. *Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.* (1908) 191 N.Y.

123, 132, 83 N.E. 693, 18 L.R.A., N.S., 713, quoting Story's work on the Constitution.

19. See, e.g., the analysis of the late Mr. Justice Jackson in the *Steel Seizure Case*, i.e., *Youngstown Sheet & Tube Co. v. Sawyer* (1952) 343 U.S. 579, 634-655, 72 S.Ct. 863, 96 L.Ed. 1153, 26 A.L.R.2d 1378.

thereby acts as a further limitation upon power. From one point of view, therefore, each department balances the other, and this system of checks and balances is another illustration of the methods used by the founders to prevent despotic abuse of power. The Massachusetts Constitution of 1780 contained such internal checks and balances, e. g., a council checking the governor, the senate doing likewise for the house, and the federal Constitution follows suit. For example, the President sends a State of the Union message to Congress and proposes legislation; Congress may enact bills but the President must sign them; but even his veto power is circumscribed by the two-thirds overriding votes of each House; or the President may seek to appoint a Supreme Court justice, which requires Senate confirmation. Chief Justice Taft phrased this overall view excellently:

"The federal Constitution nowhere expressly declares that the branches of the government shall be kept separate and independent. All legislative powers are vested in a Congress. The executive power is vested in a President. The judicial power is vested in one Supreme Court and in such inferior courts as Congress may from time to time establish. The judges are given life tenure and a compensation that may not be diminished during their continuance in office with the evident purpose of securing them and their courts in independence of Congress and the executive. Complete independence and separation between the three branches, however, are not attained, or intended, as other provisions of the Constitution and the normal operation of government under it easily demonstrate. By affirmative action through the veto power, the executive and one more than one-third of either House may defeat all legislation. One-half of the House and two-thirds of the Senate may impeach and remove the members of the judiciary. The executive can reprieve or pardon all offenses after their commission either before trial, during trial or after trial, by individuals, or by classes, conditionally or absolutely, and this without modification or regulation, by Congress Negatively one House of Congress can withhold all appropriations and stop the operations of government. The Senate can hold up all appointments, confirmation of which either the Constitution or a statute requires, and thus deprive the President of the necessary agents with which he is to take care that the laws be faithfully executed.

"These are some instances of positive and negative restraints possibly available under the Constitution to each branch of the government in defeat of the action of the other. They show that the independence of each of the others is qualified and is so subject to exception as not to constitute a broadly positive injunction or a necessarily controlling rule

of construction. The fact is that the judiciary, quite as much as Congress and the executive, are dependent on the co-operation of the other two, that government may go on. Indeed while the Constitution has made the judiciary as independent of the other branches as is practicable, it is, as often remarked, the weakest of the three. It must look for a continuity of necessary co-operation, in the possible reluctance of either of the other branches, to the force of public opinion.”²⁰

§ 11. — Recapitulation—The Structure of the Constitution

The preceding sections have disclosed that a tripartite form of federal government, limited in nature and also as to the exercise of its powers, and with internal checks and balances, was to be organized. This could be accomplished by having three separate portions of the new document allocated, one to each branch, with each such portion granting powers and providing for limitations.

There were, however, several other problems which had to be solved. For example, in the old Articles there were provisions concerning the privileges and immunities of the citizens of each state, of the full faith and credit to be given by each state to the judicial acts of the others, etc.; what was to be done with these, and other, provisions which were designed to mold the independent states into a cooperation union? And what about amendments?

In a sense the structure of the Constitution could be simply visualized. First, set up a federal government with powers and limitations thereon, and, second, take care of the other things which had to be done. The Convention's Committee on Style therefore utilized the first three Articles to create the three departments and which are termed, respectively, the Legislative Article, the Executive Article, and the Judicial Article. The other things now required to be done included the welding of the states into a more perfect federal union, and this was immediately accomplished by having the fourth, or Federal Article, contain such provisions. The Amending Article is the fifth and, in theory, nothing more was required save to provide for the ratification (Article VII which is here unimportant. However, a sixth Article was added which contains, among others, a clause making the Constitution the Supreme Law of the Land, thereby giving it the name of the Supremacy Article.

20. *Ex parte Grossman* (1925) 267 U. S. 87, 119-120, 45 S.Ct. 332, 69 L. Ed. 527, 38 A.L.R. 131.

§ 12. The Constitution Examined—Article I, The Legislative Article—Introductory

Article I contains ten sections, the first vesting all legislative powers in a Congress consisting of a Senate and a House of Representatives; the second through the seventh refer, generally, to the organization, qualifications of members, sitting, records, etc., of Congress, and, to us, are not here of present major concern; sections 8, 9 and 10, however, are here the most important sections in this Legislative Article.

The opening words of § 1 are: "All legislative powers herein granted shall be vested in a Congress" In § 8 the specific grant of legislative powers to Congress is enumerated in seventeen clauses, with a final eighteenth being termed the Necessary and Proper Clause. Section 8 thus points up the historical claim that Congress exercises a series of granted powers, and that unless its powers are found somewhere in the entire Constitution (and Amendments) it cannot exercise any other (although later we discuss "implied," etc., powers).

Section 9 now lists a series of limitations upon the exercise by Congress (and the federal government) of any of the powers granted by § 8 or elsewhere.

Section 10 does the same for the states, listing the limitations imposed upon the exercise of power by them.

Sections 8, 9, and 10 give us, respectively, (a great many of) the grants of powers to the federal government, the limitations thereon, and the limitations on state powers. But where is a grant of powers to the states?

The answer is nowhere, for the original colonies, as we have seen above, acting as sovereign states during their compact under the Articles of Confederation, theoretically retained all their powers not granted in the Constitution to the new federal union. There was thus no need to list their powers, for the detailed coverage might well have extended indefinitely. The Tenth Amendment apparently recognizes this reservation of state powers save insofar as granted to the federal government or prohibited to them. These concepts may be simply illustrated:

	Powers (Illustration of)	Limitations (Illustration of)
Federal	I, § 8	I, § 9
State		I, § 10

When we speak of Article I, § 8, we mean the grant of (a great many of the) powers to the federal government (for Con-

gress is one part of it) ; Art. I, § 9 contains (many) limitations upon the exercise of state powers. That is why the preceding diagram contains “(Illustration of).” Thus a caveat should here be set forth: we do not say, or mean to imply, that federal powers and limitations, and state limitations, are to be found solely and only in Art. I, §§ 8, 9, and 10. To the contrary, for throughout the Constitution and the Amendments many more powers and limitations, and sources of powers and limitations, both upon the states as well as upon the federal government, are to be found. All we are doing is utilizing a pedagogical method to set up, for discussion, the constitutional doctrines and principles we find in the federal Constitution. This approach provides a simple initial method to analyze problems and cases arising under the Constitution. Solely as a guide or preliminary procedure:

- 1st. Ascertain if it is a federal or state law or action which is involved, whether by the legislature, the executive, or any official or administrative body.
- 2nd. If federal, then there must be a grant of power (in § 8 or elsewhere) before it can be exercised (note: the power may be implied, etc.).
- 3rd. If there is such a power, then check to see if there is a limitation (§ 9 or elsewhere) upon its exercise.

However, if the answer to the first question shows a state law or action is involved, then question 2 is automatically out, for we may assume at the outset that the state has power; all we do is check the third question, is there any limitation (§ 10 or elsewhere) upon the exercise of this assumed and admitted power (although such limitations may include implied ones, questions of conflict with the federal powers, etc.).

§ 13. — — Sections 1-7

These few sections set up the Congress and vest in it all federal legislative powers; create a Senate and House; set forth qualifications, methods of choosing (see also the 14th Amendment, § 2), tenure, etc. of their respective members; give the House certain powers and rights, as having revenue bills originate there, impeaching (preferring charges against) federal officials, etc.; and give the Senate certain powers and rights, as by amending House revenue bills, trying those impeached by the House, etc. Both Houses “shall be the judge of the elections, returns and qualifications of its own members,” and each is to keep a journal. Neither House, during sessions, can adjourn for more than three days or from Washington without the other’s consent. Aside from a ten-day provision and the pocket veto, the President’s signature is ordinarily required before a bill becomes a law, but two-thirds of both Houses can override a veto. The individual mem-

bers are subject to their respective House's rules and discipline, and may even be expelled, but while attending a session, and travelling to and returning from it, they are privileged from arrest except for treason, felony, and breach of the peace, "and for any speech or debate in either House they shall not be" liable elsewhere.²¹

§ 14. — — Section 8

This section grants many, but is not the entire grant of, powers to the Congress, or to the federal government. It has eighteen clauses, the first seventeen being grants of specific powers to Congress, and the eighteenth, or Necessary and Proper Clause, giving it power "To make all laws which may be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof." Each Clause is a separate and substantive grant of power, and each is distinct from the others.²² The important (for us) Clauses may be the following:

Clause 1. The Tax Clause (in order) to pay debts, provide for the common defense, and the general welfare. The famous General Welfare Clause is found here, and in the *Butler* case²³ the government attempted to sustain the first triple-A Act of 1933 by claiming that through such clause it had received a direct grant of power to act. The Supreme Court disagreed, holding that "The true construction undoubtedly is that the only thing granted is the power to tax for the purpose of providing funds for the payment of the nation's debts and making provision for the general welfare." There is thus no grant of a specific general welfare power but a power to tax for the purpose of doing certain things, e. g., pay debts, defend, and provide for the general welfare (although these ends are rather broad).

Clause 3. To regulate commerce, foreign and interstate (as well as with the Indian Tribes). This famous Commerce Clause

21. There are several items in these first sections which have been changed by Amendments. Section 2, cl. 3, apportions representatives and direct taxes among the states in proportion to all "free persons," excluding Indians, and "three-fifths of all other persons," i.e., Negroes. The 14th Amendment, in its § 2, struck this ratio out. The apportionment of direct taxes is changed by the 16th Income Tax Amendment permitting a direct federal tax upon income without apportionment among the states. Section 3, cl. 1, relating to the choosing of Senators by state legislatures, is

amended by the 17th Amendment, providing for popular election directly by the electorate. Section 4, cl. 2, referring to the opening of Congress, is amended by the 20th Lane Duck Amendment, permitting the newly-elected Congress to meet less than two months after election.

22. Chief Justice Marshall in *Gibbons v. Ogden* (1824) 9 Wheat. 1, 201, 6 L.Ed. 23.

23. *United States v. Butler* (1936) 297 U.S. 1, 64, 56 S.Ct. 312, 80 L. Ed. 477, 102 A.L.R. 914.

is the basis for most of the economic regulations beginning with the 1887 Interstate Commerce Commission Act. This Clause is discussed in greater detail in Chapter X.

Clause 5. To coin money, regulate its value, etc. This, like the Naturalization and Bankruptcy Clause 4, deprives the states of any powers over the subject matter, especially when we note an express limitation in Section 10 on the same subject. The famous 1933 Roosevelt laws, withdrawing gold from circulation and vitally affecting the nation's private and public contracts, were based on this grant of power (amongst others).

Clause 9. To constitute tribunals inferior to the Supreme Court. This power will again be discussed under Article III, below.

Clause 17. To exercise exclusive jurisdiction over the capital at Washington, as well as over all federal forts, dock-yards, and public buildings in the states.

Clause 18. The Necessary and Proper Clause, given above in full. We must note that this Clause is not limited to a grant to Congress of additional "necessary and proper" powers for the sole purpose of enabling that body to carry "into Execution the foregoing [seventeen] Powers," for this Clause then continues with a conjunction, namely, "and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." In other words, Congress is broadly given undefined powers which are "necessary and proper" to carry into execution not only the seventeen previous types of power, but also all other federal powers which are vested in the government, any of its departments, or any officers thereof.

The preceding specific grants of powers are chosen for this condensed analysis merely because they are widely known, for it may well be that cl. 8, under which Congress establishes patent and copyright laws, has made America what it is; or that cl. 11, giving Congress power to declare war, gives it the power of life or death over our nation.

§ 15. — — Section 9

Whereas § 8 grants specific and general powers to Congress, § 9 limits the ability of the federal government to do all it might conceivably be able to do under all of its received powers. There are eight clauses in § 9, of which the first (it contains a built-in time limitation, and the 13th Amendment also covers this) and the fourth (changed by the 16th Amendment) are of no great present concern, while the fifth, sixth, seventh, and eighth are seldom, if ever, utilized or invoked. This leaves the second and third remaining, the former preventing the suspension of the writ of habeas corpus save in times of rebellion or invasion, and the latter pre-

venting the enactment of a bill of attainder or ex post facto law. These clauses are respectively discussed in §§ 307, 308, and 309, *infra*. But again a caveat is set forth, namely, that many other limitations are to be found elsewhere in the Constitution or its Amendments, either upon the federal or state governments, or upon both (e. g., the 13th Amendment).

§ 16. — — Section 10

This section contains three clauses. The first forbids the states from conducting any foreign affairs, coining money or emitting bills of credit, and repeats the bill of attainder and ex post facto limitations of § 9 as like limitations here upon the states. The important limitation, especially for the early life of our nation, is the one forbidding a state from passing any "law impairing the obligation of contracts," i. e., the Contract Clause (§ 311, *infra*). The second clause permits the states to control incoming merchandise or articles when "absolutely necessary for executing its inspection laws", i. e., the Inspection Clause (§§ 77 and 232), and the third forbids states from entering into agreements or compacts with other states, i. e., the Compact Clause (§ 74).

§ 17. — — Recapitulation and Comparison With Articles of Confederation

Article I sets up the legislative branch of the federal government and then gives us an "8-9-10" series of grants of (many) powers and (many) limitations for and upon the federal government, but only certain limitations upon a state. This constitutional scheme has made a simple procedure available in examining cases and problems, namely, that set forth above in § 12. The use of this method cannot give infallible answers but may suggest possible lines of analysis and approach which may well result in the desired conclusion.

How does this entire Legislative Article compare with the pertinent Articles of Confederation which have been digested in § 3 above? The old Art. II specifically retained to each state its sovereignty, as well as every power not "expressly delegated" to the federal government. Now the state's retention of sovereignty is not so expressly mentioned, and the practical effect of the new Necessary and Proper Clause, as well as all the other grants, is to reverse the former limitation upon the federal government and place it upon the states. This is too broad a statement, but it serves to highlight the new approach. Old Art. V created a unicameral legislature, and is now replaced by a Senate and a House, with the method of electing representatives under federal control, and giving the populous states greater representation in the House. The immunity of congressmen is continued. Old Art. VI

had limited the states in several ways, and those not outmoded were now retained in new § 10. Old Art. VII was eliminated, thereby giving the federal government control over its armed forces. Old Art. VIII had made the federal government dependent upon a common treasury "supplied by the several states, in proportion to the value of all land within each state," and the taxes therefore were to be "laid and levied" by the states. Now, however, the federal Congress was given power "to lay and collect taxes," but "direct taxes shall be apportioned among the several states" ²⁴ Old Art. IX granted certain powers to the Congress, practically all of which are repeated in the Constitution, save that the judicial power to decide controversies between two or more states (or individuals claiming state grants of land) is now lodged in the Supreme Court, and the "Committee of the States" which was to function during Congressional recesses was no longer needed. Additionally, a limitation upon the powers of the old Congress, by virtue of a requirement that at least nine of the states assent, was eliminated. Old Art. X granted powers to the "Committee of the States," but this was also dropped, as was the invitation to Canada to join contained in old Art. XI. Old Art. XII made the old debts a charge upon the confederation, and this was in effect continued by new Art. V, par. 1. Old Art. XIII permitted amendments, i. e., "alterations," which first had to "be agreed to in a congress of the united states" (apparently by a majority under Art. IX, par. 6), and then "confirmed by the legislatures of every state," whereas the new Amending Article requires a majority proposal in one of two ways, and only a three-quarter ratification vote in one of two ways.

§ 18. — Article II, The Executive Article

This article contains four sections concerning the executive branch of the federal government. The first clause of the first section vests these executive powers in the President, and then follow seven more clauses which give his qualifications, method of election, etc.²⁵ The second section contains three clauses, the first making the President the Commander-in-Chief of the military forces and giving him power "to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." The second clause gives him power to make treaties, appoint ambassadors and other public ministers and consuls, and also appoint judges of the Supreme Court, all provided that two-

24. The 16th Amendment, of course, since 1913 permits Congress "to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

25. Clause 6, concerning the succession to the Presidency in case of death, etc., has been changed by the 20th Amendment.

thirds of the Senate concurs. He can also make appointments of all other officers as established and provided by law. Clause 3 permits him to make recess appointments which expire at the end of the next Congressional session unless approved beforehand. The third section is of general interest, and the last section provides for the removal of the President and all civil officers of the United States "on impeachment for, and conviction of, treason, bribery or other high crimes and misdemeanors."

There is little of comparison between this Executive Article and any of the provisions which are found in the old Articles of Confederation. The old Articles set up no executive department and mentioned no president separate and apart from the Congress. In old Article IX, par. 5 granted authority to Congress to appoint a "Committee of the States" to manage "the general affairs of the united states" during any Congressional recess, and then provided: "to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years" This is a far cry from the new President as envisaged in and created by the new Constitution.

§ 19. — Article III, The Judiciary Article

This most important of all the articles, for lawyers, concerns itself primarily but not only with the judiciary. There are three sections, the second having three clauses and the third having two. Of these sections and clauses only the first section, and the first two clauses of the second section, involve the judicial power as we study it. The other clauses and section are not material here, e. g., § 2, cl. 3 directs that all crimes, save those involving impeachment, be tried by jury in the state where committed, and if not committed in any state, then where Congress by law directs; § 3, cl. 1 defines treason, and requires the testimony of two witnesses to the same overt act or a confession in open court before a conviction; and cl. 2 grants Congress power to declare the punishment for treason but limits it to the person during his lifetime only.

Before we analyze Article III further a caveat must be set forth, that we do not here discuss the definition or content of the judicial power as such. In Chapter II one aspect of this is discussed, namely, the power of judicial review, and in Chapter VI the overall power is further analyzed. Here we merely note where the judicial power is lodged, to what and to whom it extends, and what kind of jurisdiction is involved.

The judicial power is, according to § 1, vested in one Supreme Court, and also "in such inferior Courts as the Congress may from

time to time ordain and establish.”²⁶ The judges hold office during good behaviour, that is, for life. This first section creates the “one” High Court, and no other body equal to it may be created, only “inferior” ones. The “judicial power” is thus limited to a system of one Supreme Court plus Congressionally-established inferior courts; and these “constitutional courts” are thus to be distinguished from administrative tribunals or so-called courts which are creatures of the legislature, e. g., the National Labor Relations Board, the Federal Trade Commission. The federal judicial power is, generally speaking, exercised solely and only by the federal District Courts, the Courts of Appeal, and the one Supreme Court.²⁷

Section 2, cl. 1 now extends this judicial power to certain matters and to certain persons: (a) In its opening part, “to all cases, in law and equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their authority.” Any dispute which is not a “case” or as we shall later see, a “controversy,” does not, therefore, come within the judicial power; and even if it does come within the judicial power, the case must be one arising under the Constitution, statutes, and treaties. (b) To named individuals, e. g., ambassadors, other public ministers, and consuls. (c) To admiralty and maritime jurisdiction. (d) To controversies to which the United States is a party. (e) To controversies between two or more states. (f) Or between a state and a citizen of another state (although the 11th Amendment has altered this power). (g) Or between citizens of different states. (h) Or between citizens of the same state who claim land under grants of different states. And, finally, (i) also between a state or its citizens, on the one hand, and a foreign

26. Art. I, § 8, cl. 9, reads: “The Congress shall have Power . . . To constitute Tribunals inferior to the supreme Court.” Then, it may be queried, why the quoted text language in which Art. III, § 1, states the judicial power is vested also “in such inferior Courts as the Congress” may thereafter establish? The short answer is that while the first Article empowers Congress to create such inferior courts, the third vests the judicial power in these, which, under Art. I, Congress has created. The judiciary apparently has ignored cl. 9 and speaks only of Art. III as the source of this power to create constitutional courts, for without giving them judicial power they would not be courts. See, e.g., *Ex parte Bakelite Corp.* (1929) 279 U.S. 438, 49 S.Ct. 411, 73 L.Ed. 789.

27. There are, of course, other “courts” such as the territorial courts, District of Columbia courts, etc., but these may or may not be true “constitutional courts.” For Congress has complete power and control over their jurisdiction, and may constitute these as true or quasi-courts, as it desires. For example, in *Jordan v. American Eagle First Ins. Co.* (1948) 83 U.S. App.D.C. 192, 169 F.2d 281, the Congress, acting as does a state which controls its system of courts fully, statutorily required the federal district court in the District of Columbia to assume non-judicial, i.e., administrative, jurisdiction and function as a sort of super-agency in certain matters.

state or its citizens or subjects (by a foreign state is meant a foreign nation).

The first clause thus enumerates the types, situations, and individuals to whom the judicial power of all these constitutional courts is extended. But what jurisdiction does the one Supreme Court, as the only such court, possess? Clause 2 gives the Supreme Court both original and appellate jurisdiction. In its first sentence original jurisdiction is granted in all cases affecting named parties, e. g., ambassadors, other public ministers and consuls, and those in which a state is a party. The second sentence says that in all other cases mentioned in the first clause (set forth above in the preceding paragraph) the High Court has appellate jurisdiction as to law and fact "with such exceptions, and under such regulations as the Congress shall make."

Thus the first section constitutionally creates one Supreme Court (and refers as well to those inferior ones which Congress may create under Art. I, § 8, cl. 9), and vests all federal judicial power in this system of constitutional courts; the first clause of § 2 extends the judicial power over cases and controversies involving named parties or individuals, as well as certain subjects; the second clause of § 2 picks out of these cases and controversies those involving ambassadors, ministers, etc., and gives the Supreme Court original jurisdiction over them, but as to all other and remaining ones the High Court has only that appellate jurisdiction which Congress, by statute, permits.

What comparisons may be made between this Judiciary Article and the old Articles of Confederation? Save for old Art. IX's par. 2, which granted the Congress (judicial) power to adjudicate "all disputes and differences now subsisting or that may hereafter arise between two or more states concerning boundary, jurisdiction or any other cause whatever," there is none. This grant was now lodged in the original jurisdiction of the new Supreme Court.²⁸

§ 20. — Article IV, The Federal Article

This Article is known as the Federal Article, for its general purpose is to weld the confederated states into a more perfect federal union. There are four sections, the second and third having respectively three and two clauses, the third clause of § 2 being of no moment since the 13th Amendment freed the persons "held to service or labour" mentioned in this clause. The second clause of § 2 involves extradition from one state to another (or demanding) state, but since a governor's discretion is unassailable

28. The old par. 3 grant of power to Congress to adjudicate "controversies concerning the private

right of soil claimed under different grants of two or more states" was lodged in the federal judiciary.

in refusing a demand, the section is of no legal value, and policy considerations are generally the only bases determining discretion and its exercise. The fourth section guarantees each state a republican form of government, but since the Supreme Court has held this to be a political question it is up to the other branches of the federal government to enforce it; as, for example, Congress may refuse to seat a member because his state violates the guarantee, or the President may refuse to send federal troops to aid a state on like grounds. Section 3, cl. 1 permits new states to be admitted by Congress but limits this in a manner never yet violated. Of the seven clauses and sections four may therefore be removed from lengthy consideration.

Section 1 contains the Full Faith and Credit Clause and is discussed in detail in § 76, *infra*; section 2, cl. 1 is called the 4th Article Privileges and Immunities Clause (to distinguish it from the 14th Amendment's like clause), and § 80 discusses this; and section 3, cl. 2, which gives Congress power to control and dispose of territories and property of the United States, is discussed in § 71 in conjunction with the power granted to Congress in Art. I, § 8, cl. 17.

How does this Federal Article compare with the old Articles of Confederation? For practical purposes we may say that it is almost an exact copy of the old provisions.²⁹ This may be so with respect to, for example, old Art. IV, par. 2, and new Art. IV, § 2, par. 2, which include the Extradition Clause,³⁰ but for the lawyer there are significant differences. For example, old Art. IV, par. 3, stated that "Full faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state." New Art. IV, § 1, states that "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state" In addition, Congress is now given power to legislate on the manner in which these public acts, etc. are to be proved, and the effect thereof. Secondly, old Art. IV, par. 1 granted to "the free inhabitants" of the states "all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively" New Art. IV, § 2, cl. 1, states that "The citizens of each state shall be entitled to all the

29. See, e.g., Morison & Commager, *The Growth of the American Republic* (1942) I, 287: "Article IV of the Constitution, copied almost word for word from the Articles of Confederation, has an international flavor"

30. New cl. 3, applying to runaway slaves, is of course not found in the old Articles and itself has been eliminated by the 13th Amendment.

privileges and immunities of citizens in the several states." The old language was much broader and more inclusive than is the new. For example, the old "inhabitants" may have had to be free, but they were not required to be citizens of the state; the old "people" of each state were now able to travel freely, and had the same legal job and work opportunities as did the "inhabitants" of the other states into which the "people" went. The new language limits its privileges and immunities to the "citizens" of a state so that inhabitants or people of a state who are not also citizens, i. e., aliens, are apparently not covered, nor are citizens of the national government, i. e., national as distinguished from state citizens.³¹ Thirdly, old Art. XI permitted Canada to join the Confederation without any further vote of the states "but no other colony" could be admitted unless at least nine states agreed. New Art. IV, § 3, par. 1, grants to Congress the power to admit new states subject to certain (minor) limitations. Finally, new Art. IV, § 3, par. 2, and § 4, respectively giving disposal power to Congress over federal territory and property, and having the United States guaranteeing to every state a republican form of government, find no counterpart in the old Articles (although by implication the former would undoubtedly have been upheld).

§ 21. — Article V, The Amending Article

This Article is concerned solely with the amending process. The key words or fractions are "two-thirds" and "three-fourths." Amendments may be proposed in one of two ways: first, by two-thirds vote of both federal Houses (which does not require the President's signature, and he does not enter the amending process in any way); or, second, when two-thirds of the state legislatures so apply to Congress, it shall call a (federal) convention for proposing amendments (never yet actually used although a tax-limitation amendment is today being initiated and circulated). After an amendment is proposed (and submitted to the states) it becomes valid as part of the Constitution when either one of two methods of ratification is utilized: first, when three-quarters of the legislatures of the several states ratify; or, second, when three-quarters of special state conventions ratify the proposed amendment. Thus a two-third vote proposes, but a three-quarters vote ratifies, i. e., it may be simple to propose but it is more difficult to ratify and adopt. But while the proposal may be initiated by

31. See, for example, the analysis and cases cited by Mr. Justice Douglas, concurring, in *Edwards v. California* (1941) 314 U.S. 160, 180, 62 S.Ct. 164, 86 L.Ed. 119. Cf., however, Justice Miller's statement in the *Slaughter-House Cases* (1873)

16 Wall. 36, 75, 21 L.Ed. 394, that "There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each."

Congress or by state legislatures, without any requirement as to which method of proposal is to be used, what of ratification? May either method of ratification be used as the ratifying state desires? The answer is that the Fifth (Amending) Article specifically provides that whether state legislatures or conventions are to be used is up to Congress. To date only the 21st Amendment, repealing the Prohibition Amendment, has specifically required ratification by state conventions.³² Additional discussion and analysis is found in Chapter IV.

§ 22. — Article VI, The Supremacy Article

Of the three sections in Art. VI the only one of importance here is the second, which contains the famous Supremacy Clause. This Clause makes the Constitution, all federal laws made thereunder, and all treaties, “the supreme law of the land,” and binds the judges in every state, “anything in the Constitution or laws of any State to the contrary notwithstanding.”

The third section requires an oath or affirmation of all federal and state officials to support “this Constitution,” save that no religious test is ever required as a condition for holding any federal office, and the first section validates all then-existing Confederation debts against the newly-formed United States.

There is no comparison which can be made between the old Articles of Confederation and the new Constitution’s Supremacy Clause. The only reasonably close, and forced, analogy is to old Art. XIII, in which every state is first abjured to “abide by the determinations of the United States in Congress assembled,” and then told to “inviolably” observe the Articles.

§ 23. — Recapitulation

To this section we have delimited the Constitutional clauses that should ordinarily be understood by the average well-informed citizen in this democracy, and especially by lawyers and law students. We have pointed out some aspects of the theories behind the document, thereby providing some degree of preliminary understanding. The following chart merely regroups some of the constitutional clauses into an overall picture. It will be noted that amendments are included in the distribution of powers and limitations although we have not discussed them in any detail. But, to repeat the caveat heretofore given, neither this chart nor any other one in this text purports to be comprehensive and all-inclusive; it, as well as the diagrams, are illustrative only.

32. Any comparison between this Amending Article and the old Articles of Confederation has already

been made in § 17, *supra*, and need not be repeated here.

Congressional Powers	Executive Powers	Judicial Powers	Federal Limitations	State Limitations
<p>Art. I, § 1-vests all legislative powers in Congress.</p> <p>§ 5-each House is judge of its own members' qualifications.</p> <p>§ 8, cl. 1-Tax powers.</p> <p>cl. 3-Commerce powers.</p> <p>cl. 5-Coin money.</p> <p>cl. 9-Creatate inferior courts.</p> <p>cl. 17-Jurisdiction over capital area.</p> <p>cl. 18-Necessary & Proper Clause.</p> <p>Art. II, § 2, cl. 2-Senate must concur by $\frac{2}{3}$ vote of those present in certain Presidential appointments.</p> <p>Art. III, § 2, cl. 2-Power to control appellate jurisdiction of Supreme Court.</p> <p>Art. IV, § 3, cl. 2-Power to dispose of and control territory and property of U. S.</p> <p>Amendments: 14th, § 2, 16th, 17th, 20th</p>	<p>Art. II, § 1, cl. 1-Vests all executive powers in President.</p> <p>§ 2, cl. 1-President is head of military, with power to grant pardons.</p> <p>§ 2, cl. 2-Power to make treaties, appoint ambassadors, etc., and judges ($\frac{2}{3}$ Senate concurring)).</p> <p>Amendments: 22nd</p>	<p>Art. III, § 1-Vests judicial power in one Supreme Court and such inferior ones as Congress establishes.</p> <p>§ 2, cl. 1-Defines judicial power by reference to types of cases and controversies and to named parties.</p> <p>§ 2, cl. 2-Gives original jurisdiction to Supreme Court of certain cases (named parties) and appellate jurisdiction in all others.</p> <p>Art. VI, cl. 2-Constitution is "supreme law of the land."</p> <p>Amendments: 11th</p>	<p>Art. I, § 9, cl. 2-No suspension of habeas corpus.</p> <p>cl. 3-No bill of attainder or ex post facto law.</p> <p>Art. III, § 2, cl. 3-Criminal trials must take place in state where committed.</p> <p>Art. II, § 3, cl. 1-defines treason and gives requirements for conviction; cl. 2-Punishment given.</p> <p>Art. IV, § 3, cl. 1-No new states admitted, etc. without consent of other if latter injured.</p> <p>Art. V-Amending power ultimately in states and people.</p> <p>Art. VI, cl. 1-Confederation debts valid.</p> <p>cl. 2-Constitution "supreme law."</p> <p>Amendments: 1-8, 11, 13, 15, 19.</p>	<p>Art. I, § 10, cl. 1-No granting of titles, entering treaties, coining money, or passing any bill of attainder, ex post facto law, or law impairing obligations of contracts.</p> <p>Art. IV, § 1-Full Faith and Credit Clause.</p> <p>§ 2, cl. 1-P & I Clause.</p> <p>Art. VI, cl. 2-Constitution, etc. "supreme law of the land."</p> <p>Amendments: 1, 4, 5 (portion), 6 (last clause), 13, 14, 15, 19.</p>

§ 24. Conclusions

The Constitution owes much of its broad structure and general content to the experiences of the people who wrote it. There is not much of newness, but, for the first time in history, a nation had voluntarily set down in writing its fundamental law, creating, endowing and limiting a national government in a federal system. The Constitution speaks of states, grants or permits them to exercise powers, limits them, and otherwise explicitly and impliedly assumes the existence of these numerous sovereigns. State activities are not alone permitted but, if ceased, and without the federal or another government assuming them, chaos and anarchy might result. This means that two sovereigns had to exist, in one geographical area, so that in each state the people would be subject to two authorities. A national or federal, and a local or state, allegiance thus had to result, and conflicts necessarily were occasioned. But, as Taney wrote in 1849, "For all the great purposes for which the federal government was formed, we are one people, with one common country. We are all citizens of the United States" ³³ "In all other respects the States are necessarily foreign to and independent of each other." ³⁴ What this meant for the future was simple. There had to be a "shake-down cruise," a working-out of the adjustments and compromises which had gone into the making and wording of the Constitution and its clauses. Grave problems of meaning and interpretation were inevitable when the three co-equal branches sought to execute their powers. And like grave problems had to arise when the national power collided with a local one. For any understanding of the forces which entered into and molded the events which followed the ratification of the Constitution the student cannot immerse himself in "the" law alone; history, economics, political science, sociology, and the other disciplines provide aid and comfort. One legal key may, however, be suggested along the lines already given in § 12, *supra*. That key involves the concept of unlimited power necessarily becoming despotic, so that limitations are required at the outset. This concept may be diagrammed as follows:

Powers ←—Constitution—→ Limitations

The diagram may be simply interpreted. Insofar as the federal government is concerned, it is the federal Constitution which has created it and given it powers; but it is also this same Con-

33. Dissenting, in *The Passenger Cases* (1849) 7 How. 283, 492, 12 L. Ed. 702, 790.

34. The entire quotation is: "For all national purposes embraced by the Federal Constitution, the States and the citizens thereof are

one, united under the same sovereign authority, and governed by the same laws. In all other respects the States are necessarily foreign and independent of each other." Quoted by Morison & Commager, *supra* note 29, at p. 288.

stitution which provides limitations upon these powers. Both powers and limitations thereon emanate from this document. Insofar as the states are concerned, the Constitution "grants" them powers but slightly, for they have their own great reservoir; limitations, however, proceed from the document. The type and nature of the federal and state powers are of importance, just as are the type and nature of the limitations. For the moment, however, the description of the Constitution, its background and its problems, enables us to proceed further.

Chapter II

JUDICIAL REVIEW, METHODS, AND LIMITATIONS

§ 30. Judicial Review Over State and Federal Actions—The Problem Posed

In the preceding Chapter the separation doctrine was discussed in § 9. Brandeis was quoted to the effect that the legislative, executive, and judicial powers were purposely separated so as to preclude the exercise of arbitrary power. Such a separation, however, is not true in a strict sense, for overlapping does occur as the system of checks and balances discussed in § 10, showed. The meaning of the doctrine was disclosed to be that the whole or entire power of a department should not be exercised by either of the other departments, for this would subvert the principles of a free Constitution. There is, then, some degree of intermixing among the departments, for "The exigencies of government have made it necessary to relax a merely doctrinaire adherence to a principle so flexible and practical, so largely a matter of sensible proximation as that of the separation of powers."¹

The separation doctrine, however, also implies that the three departments are co-equal; that is, that no one department ranks above the others. In political theory this may be correct, but in political practice it becomes untenable. For, as Marshall early put it, a written constitution is necessarily "the fundamental and paramount law of the nation," and this theory is "one of the fundamental principles of our society." "If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law?"²

The same questions might well be asked by the Chief Justice; and, in turn, the other branches might ask these questions of him or, indeed, judicial action might also be questioned. What this means, if we may analogize, is that: three co-equal "partners" are operating under a written agreement of partnership; this agreement is not clear-cut and unambiguous; one of the partners may well do something which he feels is within his power but the others feel is ultra vires; but how resolve the problem? If three persons were actually involved as partners the answer would be

1. Cardozo, in *Matter of Richardson* (1928) 247 N.Y. 401, 410, 160 N.E. 655.

2. *Marbury v. Madison* (1803) 1 Cr. 137, 2 L.Ed. 60. See also § 114, *infra*.

found in the courts; but when the problem goes up to the highest type of partnership we assume here, then who is there higher? In other words, is one of the three equal partners more equal than the others?

To this point the problems are presented in a federal atmosphere, that is, where a federal legislative or executive act is claimed to be unconstitutional. But suppose the act has been committed by a state, that is, by an official or delegatee of the state or one of its municipalities? Is there a different problem raised by a different set of questions with a different background? The basic question we ask is, has the federal Supreme Court any power to review state and federal acts and activities? This is the only and particular judicial power we discuss, for in Chapter VI other aspects of the overall judicial power are set forth and analyzed.

§ 31. — Acceptance of Federal Judicial Review of State Actions

The problem of some sort of federal review of state actions was discussed and apparently deemed settled in the debates in the 1787 Constitutional Convention. It was only the method which was in dispute. The Virginia Plan (in the sixth resolution) carefully bifurcated the problem of the negating of state and federal laws and, as to the former, proposed that "the National Legislative ought to be impowered . . . to negative all laws passed by the several States, contravening in the opinion of the National Legislative the articles of the Union" The Pinckney Plan went even farther in requiring prior federal legislative approval before any state law could become effective, and there were other like plans advanced. During the debate on the Virginia Plan's sixth resolution James Madison took to task those "Legislature[s] who would be willing instruments of the wicked & arbitrary plans of their masters," and who would displace "Judges who refused to execute an unconstitutional law" He continued: "A power of negating the improper laws of the States is at once the most mild & certain means of preserving the harmony of the [new governmental] system."³ Gouverneur Morris was opposed to the negating method only because, he felt, "A law that ought to be negated will be set aside in the Judiciary department. And if that security should fall; may be repealed by a National law." Despite strong support for some Constitutional method of negating improper state laws, the majority apparently felt with Roger Sherman, of Connecticut, that it was "unneces-

3. Farrand, *The Records of the Federal Convention of 1787* (1911) II, 28. Madison also declared that "Experience proves a tendency in our governments to throw all power into the Legislative vortex. The

executives of the States are little more than ciphers; the Legislatures are omnipotent. If no effectual check can be devised on the encroachments of the latter a revolution will be inevitable."

sary; the laws of the General Government being Supreme & paramount to the State laws according to the plan as it now stands." This was an implied power, however, and the express method was apparently rejected because of the fear that, if included, then "If nothing else, this alone would damn and ought to damn the Constitution. Will any State ever agree to be bound hand and foot in this manner" ⁴

Whether or not the express method of negating state laws (and actions) was omitted because of a political desire for ratification is not too important now. Long before 1789, when the Constitution was ratified, the colonies had experienced repeated English Privy Council overruling of their own enactments, and also the indirect annulment of a law by the Board of Trade when it was refused application in a controversy between individuals on the ground of invalidity.⁵ More importantly, cases actually decided by the Colonial courts themselves impliedly and even expressly promulgated the doctrine of judicial review, although of course it was a colonial court which discussed a colonial law.⁶ And, regardless of such rejection by the Constitutional Convention, they eventually did incorporate a Supremacy Clause which, according to both Madison and Morris in their later correspondence, served this identical purpose.⁷ Since the method of judicial negating of unconstitutional state action was thus known and used before the Constitution became effective, and such a power was necessary for the well-being and continuation of a politically solvent federal system, no great dissent was occasioned by the initial use of this method of federal control by the Supreme Court,⁸ and the states have wisely continued to accept such a limitation ever since. State constitutions, laws, acts and all proceedings by states and their subordinates and delegates are thus subject to review

4. *Ibid.*, 391.

5. Haines, *The American Doctrine of Judicial Supremacy* (1932) pp. 50-58; see also 68-86, and see further the excellent note in Evans, *Leading Cases on American Constitutional Law* (1925) 253-263.

6. See, e.g., the 1778 Virginia Case of Josiah Phillips, and the 1780 New Jersey one of Holmes v. Walton (Haines, *American Doctrine*, supra note 5, at pp. 89 et seq.; *Commonwealth v. Caton* (Va.1782) 4 Call. 5; *Rutgers v. Waddington* (N.Y.1784), in Thayer, *Cases on Constitutional Law* (1895) I, 63; *Trevett v. Weeden* (R.I.1786), Haines, supra note 5, p. 106; *Bayard v. Singleton* (N.Car.1787) 1 Martin 48; and, on a 1788 Massachusetts case, see letter by Cutting

to Jefferson quoted in Haines, supra, pp. 120-121.

7. See Farrand, *Records*, supra note 3, III, 420, 499, 523, 527. Morris felt in writing the Constitution as finally adopted by the Convention, "it became necessary [for him] to select phrases which expressing my own notions would not alarm others nor shock their selflove" This may well be so but other writers have cast doubt upon this one-man view of the Constitution.

8. *Ware v. Hylton* (1796) 3 Dall. 199, 1 L.Ed. 568, holding a treaty to be supreme over a state law. Prior to this case the federal circuit courts, in two instances, had likewise so held.

by the judiciary upon the question whether such constitution, laws, etc. are contrary to the federal Constitution.

§ 32. — Solution of the Problem of Federal Judicial Review Over Federal Actions

The same consideration which gave rise to and supported the acceptance of federal judicial review over state action did not necessarily apply when the federal judiciary sought to review federal actions. In § 30 the rationale of this Constitutional problem was set forth, and so eminent an authority as Holmes felt that while federal (judicial) review of state acts was vital and necessary, the constitutional heavens would not have fallen if the power had been denied over federal legislation.⁹ In effect, if our partnership analogy in § 30 is accepted, there is no federal partner more equal than the others, so that no one department may seek to review the actions of the others on allegations of unconstitutionality (unless, of course, the Constitution expressly granted such a power, whereupon the delegatee thereof would be "more equal"). Any claim of such a review power would therefore have to be an assumption or a seizure; and this view was held by many of the colonists.¹⁰ How then could this power be claimed by the judiciary?

The method was two-fold, namely, taking advantage of a political situation, and covering it all with a cloak of logic which, based upon the premises, was superficially irrefutable. The background was the fall election of 1800, with Republican Thomas Jefferson defeating Federalist John Adams and replacing him the following March 4th. Before that Adams, in 1801, placed his Secretary of State, John Marshall, in the Chief Justiceship and, just prior to leaving office, also nominated as Justices of the Peace for the District of Columbia several of the local Federalist stalwarts. The nominations of these latter were confirmed by the Senate, their commissions were signed by Adams and countersigned by Marshall (still the Secretary of State), who also affixed the great seal of the United States to them, and who then, apparently, forgot to deliver them.¹¹ Jefferson took office and immedi-

9. "Law and the Court," in *Collected Legal Papers* (1921) p. 295: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperilled if we could not make that declaration as to the laws of the several states."

10. E.g., according to Thomas Jefferson, "The Constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary,

which they may twist into any form they please." *Works* (Fed. Ed.) XII, 137.

11. We write "apparently" for there is no definite and unequivocal knowledge of why these documents remained undelivered. We may, therefore, with tongue in cheek, postulate that Marshall, with foresight, saw that exactly what happened would happen, and that he, as the Chief Justice, would be able to seize this judicial review power;

ately appointed James Madison as his Secretary of State. Madison now discovered these signed and sealed commissions still physically in his office. Marbury and several of the other appointees demanded their commissions of Madison who refused their request upon Jefferson's contention that the appointments were not complete until actually delivered. Marbury and the others, claiming such delivery was merely a ministerial act which Madison could not refuse to do, sought judicial relief by applying directly to the Supreme Court for an original writ of mandamus.

Here was now a made-to-order situation for Marshall, the staunch Federalist and exponent of national over local powers and rights. By all judicial ethics and precepts he might well have disqualified himself from sitting as he had countersigned the documents in question, or, since the basic question of jurisdiction is ever-present in the federal courts, he might well have considered this before going into others. Regardless, Marshall now had the opportunity either to uphold Marbury and thereby thwart Jefferson's attempt to keep the Federalists out of these offices, or else throw these few insignificant offices to the Republicans but claim a greater power, namely, that of judicial review over Congressional acts. Marshall chose the latter. How this was accomplished is a feat as yet unparalleled in American constitutional history.

Marshall's opinion in *Marbury v. Madison* has been termed "cleverly contrived for its purposes,"¹² and indeed it was. "The first object of inquiry is," opens Marshall, "Has the applicant a right to the commission he demands?" The answer refuted Jefferson and held that Marbury's appointment was a "vested" one; that he had a right to the commission, and that to withhold it was a violation of such a right. The second question, continued Marshall, is, "If he has a right, and that right has been violated, do the laws of his country afford him a remedy?" Again Marshall answered in the affirmative, but now "It remains to be inquired whether, 3dly. He is entitled to the [particular type of] remedy for which he applies. This depends on, 1st. The nature of the writ applied for, and, 2dly. The power of this court." To this point, it may be noted, Marshall had delivered a verbal spanking to Jefferson, in effect holding out the President to be a political perverter of an individual's rights. Furthermore, to now, nothing much had yet been accomplished. For Marshall could well have considered this last question first, for the question of federal jurisdiction is always primary and uppermost. It is not until the last of Marshall's three questions is reached that jurisdiction, and

additionally, there is no reason why we cannot surmise that Marbury and the others were "in" on the plot, and did what they had to do to bring the matter before Marshall.

12. (1803) 1 Cr. 137, 2 L.Ed. 60. The quotation is from 12 Dict.Amer. Blog. 315, 319. In general, see also Hook, *The Paradoxes of Freedom* (1962) 68-77.

the constitutional problem, is met. For he now holds that mandamus, for which Marbury had applied, was proper, for the instant suit involves "a plain case for a mandamus . . . ; and it only remains to be inquired, whether it can issue from this court."

Now, for the first time in the case, does Marshall reach any federal statute. For this was a suit brought by Marbury in the Supreme Court as an original one, i. e., he had applied directly to and in the Supreme Court for that body to issue a writ of mandamus to compel Madison to deliver the commissions. Upon what constitutional or statutory provision had Marbury proceeded? Nowhere in Article III, or anywhere else in the Constitution, was there any grant of power to the Supreme Court to issue a writ of mandamus in an original proceeding. Was there such a federal statute? The answer was yes, that Congress had, at its first session in 1789, enacted the federal Judiciary Act and in it had provided, in § 13, that the Supreme Court had jurisdiction "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." Thus Marbury could now point to the Congressional statute as the basis for the Supreme Court's original jurisdiction. But, said Marshall, if the Constitution were the supreme law of the land, and the Constitution gave and defined the Supreme Court's original jurisdiction, how could the Congress give what the Constitution did not, and therefore impliedly denied? Would this not in effect permit a delegatee (agent) to override the delegator (principal)? And since in such a case the inferior's actions would be *ultra vires*, then here the conduct (action or statute) of Congress was likewise *ultra vires* or, since a written Constitution was involved, unconstitutional.

What was the result of this hot-and-cold opinion? First, Jefferson had won, so he could not throw any stones; second, the President had been held out as a law-breaker or violator of a person's rights; and, third, although the Supreme Court had refused to extend its original jurisdiction, it had done so only by holding a Congressional statute had contravened the federal Constitution. In so doing the Supreme Court had claimed for itself the judicial power to review, and declare unconstitutional, Congressional acts.¹³ This Jeffersonian victory was thus a Pyrrhic one, and since the nation was somewhat conditioned to accepting

13. The authorities agree that contemporary opinion was more incensed at Marshall's holding that cabinet officials were subject to mandamus than that the Supreme Court had power to review Congressional statutes and hold them unconstitutional. See, e.g., Evans,

Cases, *supra* note 5, at p. 258. See also *Ex parte Levitt* (1937) 302 U. S. 633, 58 S.Ct. 2, 82 L.Ed. 493. In *State Bd. of Ins. v. Todd Shipyards Corp.* (1962) 370 U.S. 451, 82 S.Ct. 1380, 8 L.Ed.2d 620, a majority wrote that "We have, of course, freedom to change our decisions on the constitutionality of laws."

this review power in general, no great outcry arose.¹⁴ It was in this manner that the Supreme Court became the great and supreme judicial body that it is in the United States today.¹⁵

§ 33. The Federal and State Court Systems—In General

In § 30 the problem of resolving Constitutional ambiguities was pointed up and, in §§ 31–32 resolved. Since it is the judiciary which has the power of such resolution, and since the court system of any jurisdiction is important to lawyers, we discuss this judicial structure in both the federal and state government.¹⁶

In the federal government the Constitution, as we saw (§ 19, *supra*), permits only one Supreme Court and such “inferior courts” as Congress may create. Congress has created many tribunals, judicial and quasi-judicial, but, in general, the judicial structure starts with the one Supreme Court at the top; below it are ten intermediate courts, each known as a United States Court of Appeals for a numbered Circuit (First through Tenth), plus an eleventh Court of Appeals for the District of Columbia;¹⁷ and, at the bottom, one or more District Courts in each state (some District Courts may have Divisions). The Supreme Court thus governs and controls the entirety of the structure, from the jurisdictional point of view insofar as judicial review is concerned; each Court of Appeals has jurisdiction over a certain geographical area of District Courts; and the District Courts hold sway within their own geographical area. Every state (and territory) has at least one federal District within it; or it may have more than one, so that we may thus have a federal District for the Eastern

14. Previously however, the individual Justices of the Supreme Court, when riding the circuit had declared a different statute unconstitutional, *Hayburn's Case* (1792) 2 Dall. 409, 1 L.Ed. 436 (see also note 20, *infra*), and had also upheld an act (impliedly they could have found it bad). *Hylton v. United States* (1796) 3 Dall. 171, 1 L.Ed. 556.

15. Marshall's pronouncement on § 13 becomes somewhat shaky in the light of later decisions. For subsequent cases hold the section “was not intended to increase the Court's original jurisdiction, but only to give it power to issue certain writs when it had jurisdiction . . .” 12 *Dict.Amer.Biog.* 315, 319.

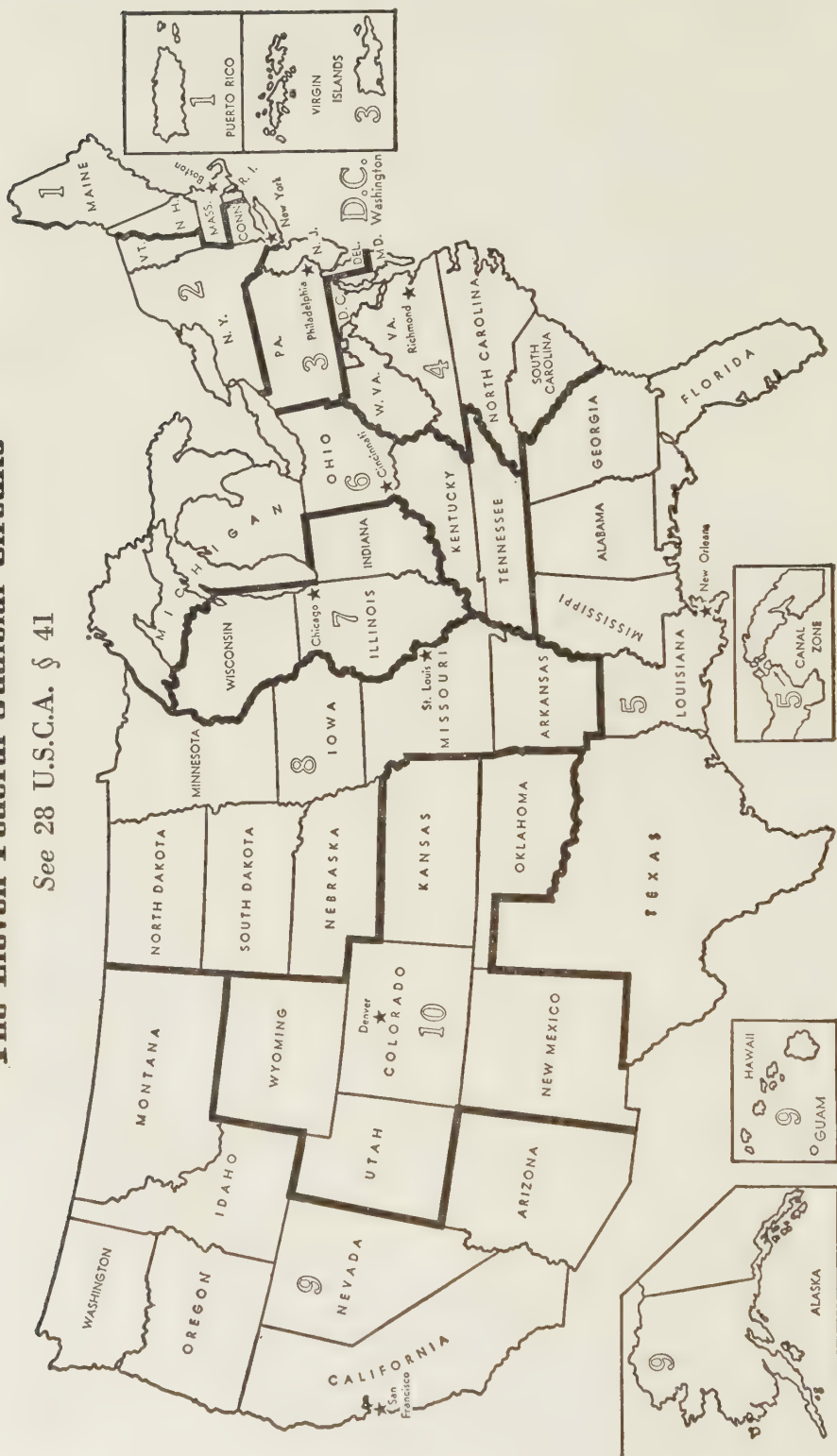
16. A caveat is given, namely, that only a general and overall view is here given. Detailed examination

of a state's own judicial structure and practice laws are required, as is also true of the federal structure. Also, it must always be affirmatively shown that any case is within the federal jurisdiction, as the presumption is against it until so shown. *Robertson v. Cease* (1878) 97 U.S. 646, 24 L.Ed. 1057; *Godfrey v. Terry* (1877) 97 U.S. 171, 24 L.Ed. 944.

17. For the composition of the eleven judicial circuits, see 28 U.S.C.A. § 41. The Chief Justice and the Associate Justices are allotted as circuit justices by the former under § 42. Retired Justices, may, if so willing, perform judicial duties in any circuit. § 294. The chart at p. 36 (“reproduced with permission of the West Publishing Company, copyright owner. All rights reserved.”) portrays this geographical division.

The Eleven Federal Judicial Circuits

See 28 U.S.C.A. § 41



District of New York, or the Northern District, etc., utilizing the four points of the compass; within a District there may be a Division, but these are not general and when they do occur they are not inferior to the District Court but are merely a part of that court held at another place.

The jurisdiction of the Supreme Court, insofar as its original jurisdiction is concerned, is an "untouchable," although its appellate jurisdiction apparently is not.¹⁸ However, the jurisdiction of the inferior federal tribunals is completely statutory, so that unlike the original jurisdiction of the Supreme Court one need not look to the Constitution but to a Congressional statute for it. A century ago the Supreme Court upheld the power of Congress to do as it will over the jurisdiction of the inferior courts:

"It must be admitted, that if the Constitution had ordained and established the inferior courts, and distributed to them their respective powers, they could not be restricted or divested by Congress. But as it has made no such distribution, one of two consequences must result—either that each inferior court created by Congress must exercise all the judicial powers not given to the Supreme Court, or that Congress, having the power to establish the courts, must define their respective jurisdictions. The first of these inferences has never been asserted, and could not be defended with any show of reason, and if not, the latter would seem to follow as a necessary consequence. And it would seem to follow, also, that, having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all."¹⁹

The federal courts have judicial powers and jurisdiction over cases and controversies only, so that any early aberration has long since been rejected.²⁰ They will not, therefore, handle any matter which will not result in a binding determination upon the parties,²¹

18. See note 35, *infra*.

19. *Sheldon v. Sill* (1850) 8 How. 441, 448-449, 12 L.Ed. 1147.

20. See, e.g., the early question of administering federal pensions to widows and orphans of veterans of the Revolutionary War, which the federal judiciary in Pennsylvania and North Carolina refused to do, although the New York federal judges agreed to do because of the "exceedingly benevolent" purposes. *Hayburn's Case* (1792) 2 Dall. 409, 410, 411-412, 1 L.Ed. 436. Today's

federal judges refuse to accept any delegation of powers other than judicial. *Gordon v. United States* (1864) 2 Wall. 561, 17 L.Ed. 921; *Federal Radio Commission v. General Electric Co.* (1930) 281 U.S. 464, 50 S.Ct. 389, 74 L.Ed. 969.

21. *Muskrat v. United States* (1911) 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246. Generally, says this case, there must be, for a case or controversy to be involved: (a) two or more parties, (b) involved in a disagreement, (c) over property or a

e. g., an advisory opinion.²² There is one exception, namely, that within the District of Columbia (and territories and possessions) the inferior courts are analogized to state courts insofar as Congressional control over them is concerned. Thus in these areas Congress is not limited by the doctrine of the separation of powers, or by Article III, and may require of its courts functions not strictly judicial,²³ although the Supreme Court may not be compelled to accept jurisdiction of such decisions for purposes of review.²⁴ The systems of law applied in the federal courts are four-fold, namely, international law, the common law, equity, and admiralty or maritime law.²⁵

The states, with the exception of Louisiana, follow the common law but their judicial structures may vary. Some states maintain the common law division of courts into law and equity (chancery) courts, with a structure to match; some states have merged the law and equity courts into one. New York, however, has long since merged its law and equity courts so that it has, at the base, one state-wide court known as the Supreme Court of the State of New York. This court is not, however, at the top, but is analogous to the federal district court system. Each county of the State of New York has one part of the court sitting within it, so that it is the Supreme Court of the State of New York, County of Orange. Above these courts there are four Appellate Divisions, numbered First through Fourth (appointed by the Governor from the elected Supreme Court justices), and having jurisdiction over certain of the counties. At the top, above the four Appellate Divisions, is the one Court of Appeals. In its major structure, therefore, this New York system is almost identical with that of the federal system. State courts, of course, are not bound by the federal separation doctrine so that their state constitutions may or may not impose non-judicial functions upon them.²⁶

right, (d) with jurisdiction in a particular court, (e) to make a final and binding determination. See also *Gordon v. United States* (1864) 117 U.S. 697, 76 L.Ed. 1347.

22. *Muskrat v. U. S.*, supra note 21. An action for a declaratory judgment is within the judicial competence, e.g., *Aetna Life Ins. Co. v. Haworth* (1937) 300 U.S. 227, 57 S. Ct. 461, 81 L.Ed. 617; *Borchard, Declaratory Judgements* (1941, 2d ed.) passim.

23. See, e.g., *Jordan v. American Eagle Fire Ins. Co.* (1948) 83 U.S. App.D.C. 192, 169 F.2d 281.

24. *Keller v. Potomac Electric Power Co.* (1923) 261 U.S. 428, 43 S.Ct. 445, 67 L.Ed. 731.

25. See, e.g., *Kansas v. Colorado* (1902) 185 U.S. 125, 22 S.Ct. 552, 46 L.Ed. 838. The District of Columbia courts were held to have common law jurisdiction on the theory that when Maryland ceded a part of its state for the capital, the common law then in force in that state remained in force in the ceded territory. *Kendall v. United States ex rel. Stokes* (1838) 12 Pet. 524, 9 L. Ed. 1181.

26. Even in the absence of such a statutory requirement, the courts may uphold the procedure as, e.g., in *Opinions of the Justices* (1923) 209 Ala. 593, 96 So. 487.

The preceding paragraphs do not imply that only these, and no other, courts exist in the federal or state jurisdictions. If we were to list all the other federal courts or "tribunals" exercising either judicial or quasi-judicial powers their number would require a page or two; if the states were added, a volume of appendices would be needed. All that is set forth is a general outline of the federal and state court structures so that we may understand the method of obtaining a Supreme Court determination of a federal constitutional question.

The Supreme Court's decisions are found in "official" and unofficial reports. The "United States Reports," cited merely as U. S., with the volume preceding and the page number following, are the official reports, published by the government. As the opinions are handed down on "decision day," generally the Monday of each week during the term when the Court is not in recess, each opinion is available in a separate printed "slip" decision; these are shortly thereafter reprinted, with additional material, in "advance sheets" every other week or so, in a paper cover; ultimately these slips and advance sheets become the bound volumes. About three to four such volumes are published for each term of the Court (i. e., decisions and opinions handed down during October through June). There is one exception to a U. S. citation, namely, that until 1875 the official volumes are known by the names of the individuals who reported the cases. These total 90, so that the first volume of the U. S. reports is number 91. The reporter volumes are:

<u>Reporter</u>	<u>Volumes</u>	<u>Period</u>
Dallas (Dall.)	4	1789-1800
Cranch (Cr.)	9	1801-1815
Wheaton (Wheat.)	12	1816-1827
Peters (Pet.)	16	1828-1842
Howard (How.)	24	1843-1860
Black (Bl.)	2	1861-1862
Wallace (Wall.)	23	1863-1874

There are also unofficial reports, i. e., privately published by commercial houses, and these are: the "Supreme Court Reporter," cited as "Sup.Ct." or "S.C.," or "S.Ct.," and the "Lawyer's Edition," cited as "L.ed." or "L.Ed."²⁷ Only official citations are permitted in the Supreme Court itself but, generally, in all other courts, and in articles, etc., a "string" citation is given thus: *Marbury v. Madison* (1803) 1 Cr. 137, 2 L.Ed. 60 (the absence of the S.Ct. citation is because it did not begin to cover de-

27. The Bureau of National Affairs, cited as "B.N.A.," publishes the reports on a loose-leaf basis.

cisions until later), or, *First Unitarian Church v. Los Angeles* (1958) 357 U.S. 545, 2 L.Ed.2d 1488, 78 S.Ct. 1350.²⁸ For the inferior federal courts, all are unofficially published (there are official governmental publications for the Tax Court, Court of Claims, etc., but none for the district and Courts of Appeal save for the District of Columbia Court of Appeal), as no governmental reports are issued; thus in the Supreme Court and elsewhere only such unofficial reports can be cited. These are the "Federal Reporter" (Fed. or F.) until volume 300, and then continued in a second series, i. e., F.2d. From 1932 on, however, only the following courts are found in F.2d: United States Courts of Appeal, United States Court of Claims, United States Court of Customs and Patent Appeals;²⁹ since 1932 a new unofficial "Federal Supplement" (F.Supp. or F.S., also F.Supp.2d) contains the cases decided in the United States District Courts and also the United States Customs Court.

§ 34. The Jurisdiction of the Supreme Court—Original

The federal Constitution, in Art. III, § 2, cl. 2, states that the "original jurisdiction" of the Supreme Court shall extend to "all [civil or criminal] Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party" ³⁰ By statute Congress has provided that the Court is to "have original and exclusive jurisdiction of" controversies among the states as such, and "actions or proceedings against ambassadors or other public ministers of foreign states or their domestics or domestic servants, not inconsistent with the law of nations." (28 U.S.C.A. § 125[a]) According to these provisions there is no other federal or state court in which these matters can be heard, for the jurisdiction is not only original but also exclusive.

However, and apart from these original and exclusive matters, there is another area of original but not exclusive jurisdic-

28. Note that "L.Ed." is now beginning a second series, having reached volume 100, and this is indicated by "2d." The U.S. and S. Ct. reports continue. This "2d" is found in other federal and state reports, but does not necessarily denote the first series has reached volume 100, it may be more. On the titles, see § 39, *infra*. We do not here, or in § 39, attempt to give any comprehensive analysis of citing cases: the reader is referred to any one of many fine volumes for this purpose. However, it may be additionally noted that merely because a party's name appears first in the title, there is no assur-

ance that he or it was the original plaintiff. In the federal system the party appealing (regardless of position in the court below) becomes the plaintiff in error, or the appellant, and its name appears first.

29. As of December 6, 1961, the United States Emergency Court of Appeals went out of existence. The proceedings are found in 299 F. 2d 1-21, and its last opinion at p. 22.

30. See also § 79 on another aspect of the Court's original jurisdiction, amended and then further nullified by judicial interpretation.

tion, i. e., a case may be instituted in the Supreme Court or any other court having jurisdiction of the subject matter and the parties. This second non-exclusive jurisdiction embraces actions and proceedings brought "by," as distinguished from those brought "against," ambassadors, etc. When such officials are now themselves bringing suit, the Supreme Court has a non-exclusive original jurisdiction.³¹ In § 32 we saw that Congress could not add to the original jurisdiction of the Supreme Court,³² and neither can that body subtract therefrom. The Supreme Court's original but non-exclusive jurisdiction includes, for example, suits by the federal government against a state, but not the converse unless the United States consents; all actions or proceedings against aliens, or by a state against citizens of other states; a suit by a state, under the *parens patriae* doctrine, on behalf of all its citizens.³³

§ 35. — Appellate

"In all the other Cases before mentioned [in Art. III, § 2, cl. 1, which defined the extent of the judicial power], the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." (Art. III, § 2, cl. 2; see for details § 20, *supra*.) At its very first session, Congress began creating "Exceptions" upon and "Regulations" of this appellate jurisdiction, the latest such general revision being made in 1948.³⁴ The limits of the judicial power are set by the Constitution in its definition of the extent of this term, so that Congress cannot increase it; but, within such limits, the power of the Congress over the Court's appellate jurisdiction is supreme, and all matters not so expressly provided for are not able jurisdictionally to be brought before the High Court.³⁵ Nevertheless, and despite the constricting ability of the Congress, the Supreme Court has generally been

31. 28 U.S.C.A. § 1251(b). Now domestics are omitted and their place taken by "consuls or vice consuls of foreign states" Also included in this category are "All controversies between the United States and a State," and "All actions or proceedings by a State against the citizens of another State or against aliens." See also § 38, *infra*, for additional details.

32. Although, it may be queried, is not the constitutional language added to when "domestics or domestic servants" is found in the statute, *supra* note 27?

33. *Lynch v. United States* (1934) 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed.

1434; *Georgia v. Pennsylvania R. Co.* (1945) 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051.

34. See e.g., 28 U.S.C.A. §§ 1251-1257, and 18 U.S.C.A. § 3731.

35. *Durousseau et al. v. United States* (1810) 6 Cr. 307, 314, 3 L.Ed. 232: Congress has "described affirmatively its [the Supreme Court's] jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it." See also *Cary v. Curtis* (1845) 3 How. 236, 245, 11 L.Ed. 576.

able, if it so desired, to review all federal and state cases in which a necessary constitutional question has been timely and properly raised. Insofar as these Congressional "exceptions" and "regulations" are concerned, therefore, it is the rare litigant who cannot bring his matter into the Supreme Court when he has a proper case and has followed correct procedure.³⁶

§ 36. The Power of Judicial Review in Practice—The Necessity for Limitations

Every power necessarily must have some limitation, lest power become absolute and freedom lost. This is the teaching of political philosophers before and since Lord Acton, and in the Preface to this volume this concept has been expressed thus: Power \longleftrightarrow Limitations. And when a written grant of power is referred to as a justification for actions, it is automatic, as well as axiomatic, that we look to this written grant for limitations thereon. Since we are a common law nation then, additionally, and in the absence of written ones, reasonable limitations may always be implied. Right now the power-limitation concept may be applied to the Constitution thus: Power \longrightarrow Constitution \longleftarrow Limitations. For every power in the Constitution there should be some limitation found somewhere, either directly, expressly and immediately, or indirectly, impliedly, and ultimately. This power of judicial review is no exception. It is a terrific and awesome power, so great that even Abraham Lincoln inveighed against it.³⁷ There are many who contend that the Dred Scott decision³⁸ hastened, if it did not act as one factor in causing, the Civil War, and some of the decisions have been reversed by the amending process.³⁹ Even Justices inveigh against the abuse of this power.⁴⁰ What, therefore, are

36. The general concepts of appellate jurisdiction only are discussed in this section and, for particular details, see §§ 39–44, *infra*.

37. See, e.g., his First Inaugural Address in 1861, stating that "if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."

38. *Dred Scott v. Sandford* (1856) 19 How. 393, 15 L.Ed. 691.

39. E.g., *Chisholm v. Georgia* (1793) 2 Dall. 419, 1 L.Ed. 440 reversed by the 11th Amendment; *Pollock v.*

Farmers' Loan & Trust Co. (1895) 158 U.S. 601, 15 S.Ct. 912, 39 L. Ed. 1108, reversed by the 16th Amendment.

40. E.g., Holmes, dissenting in *Baldwin v. Missouri* (1930) 281 U.S. 586, 595, 50 S.Ct. 436, 74 L.Ed. 1056, 72 A.L.R. 1303: "As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this court as for any reason undesirable." See also Chief Justice Hughes' famous statement, that while "we are under a constitution . . . the constitution is what the judges say it is," and Mr. Justice Stone's dissent in *United States v. Butler* (1936) 297 U.S. 1, 78–79, 56 S.Ct. 312, 80 L.Ed. 477, 102 A.L.R. 914:

these limitations, if any, upon this judicial power of reviewing federal and state legislation and actions?

§ 37. — Types of Limitations—Constitutional, Legislative and Judicially Self-Imposed

The limitations upon the power of the judicial review must first be sought in the document granting the power, namely, the Constitution. These are treated in § 38. Since the jurisdiction of the Supreme Court is not alone original but also appellate, and since it is Congress which controls this appellate jurisdiction, what are the limitations statutorily imposed upon the exercise of this appellate power? In §§ 39–44 the statutory requirements for appellate review of federal court determinations are discussed, and in §§ 45–48 the state courts are discussed. Besides these constitutional and statutory limitations, is there any other source? The answer is the Supreme Court, for it has imposed upon itself certain limitations before reviewing and deciding a constitutional question. These judicially self-imposed limitations are discussed in §§ 49–50.

These limitations are not only restrictions upon the courts as judicial reviewers of federal and state actions but they may also be treated as requirements which litigants must comply with before the High Court is empowered to review, or will review, their cases. Even with the original jurisdiction of the Supreme Court, for example, the 1954 Revised Rules, in Part III, Rule 9, is entitled, "Procedure in Original Actions," and limits the filing of an original case or controversy by prescribing a procedure therefor. Lawyers are therefore vitally interested in and concerned with all of these statutory and other limitations and requirements and while the sections which follow make no pretense of being complete they are sufficient to enable the student and the practitioner to appreciate the importance of their study.

§ 38. — — The Constitutional Limitations Upon Judicial Review—Original and Appellate Jurisdiction

The Supreme Court's original jurisdiction is not subject to increase or decrease by the Congress but, as we saw in § 37, its own Rules make provision for limitations thereon and procedures therefor. We are, nevertheless, concerned here with like constitutional limitations upon this original jurisdiction, and similarly concerned here with any constitutional restrictions upon the Court's appellate jurisdiction.⁴¹

"While unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise

of power is our own sense of self-restraint."

41. For even in this latter area, providing there be such a constitution-

The original jurisdiction of the Supreme Court is limited in Art. III by the explicit enumeration, in Section 2, cl. 2, of those to whom it extends, and also in cl. 1 of that section by the definition given to the judicial power. Insofar as the enumeration is concerned, there can be no question of coverage (although see § 34, *supra*), so that all persons not comprehended within the terms so used are not able to sue in the Court. Does this mean that if any such person is so comprehended, and is thus able to sue, that the Supreme Court must accept jurisdiction? The answer is no, for besides this limitation upon the original jurisdiction there is also a limitation upon the judicial power itself, namely, that the matter coming before it be a "case" or "controversy". Thus a named person seeking the Court's original jurisdiction cannot, in effect, seek an advisory opinion, for this is no case or controversy, and even Congress is not able to circumvent this additional limitation.⁴² The original jurisdiction, so additionally limited, is divided into two portions namely that which is exclusive to the Supreme Court, and that which is not exclusive. In other words, in the former aspect no other court in the country, federal or state, can have jurisdiction save the Supreme Court and this in an original action or proceeding; in the latter aspect the named persons may invoke the Supreme Court's original jurisdiction, if they so desire, but are also able to sue in another court which has jurisdiction over subject-matter and person. The former is mandatory, while the latter is permissive. The statutory language is clear on this, and such original and exclusive jurisdiction is limited to controversies between two or more states, and to all actions and proceedings *against* ambassadors or other public ministers of foreign nations or their domestics or domestic servants; the original but non-exclusive jurisdiction is limited to actions or proceedings brought *by* ambassadors or public ministers, or to which consuls or vice consuls are parties (domestics are omitted), to controversies between the United States and a state, and to all actions or proceedings *by* a state against citizens of other states or aliens.⁴³

al limitation, Congress cannot confer jurisdiction; assuming no constitutional limitation, then Congress' power over the appellate jurisdiction permits it to limit (or even deprive?) the Court thereof.

42. E.g., *Muskrat v. United States* (1911) 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246, and *Hayburn's Case* (1792) 2 Dall. 409, 1 L.Ed. 436. See, further, *Prentis v. Atlantic Coast Line Co.* (1908) 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150.

43. 28 U.S.C.A. § 1251(a) and (b). It may be pointed out that the Consti-

tutional language is: "In all cases affecting Ambassadors, other public Ministers and Consuls," etc. (emphasis supplied), whereas § 1251 (a) (2) speaks of "All actions or proceedings against ambassadors or other public ministers . . . or their domestics or domestic servants . . ." See also § 34, note 31, *supra*. Consuls or vice consuls are held not to be within the enumerated categories in subd. 1251(a), *United States v. Ortega* (1826) 11 Wheat. 467, 6 L.Ed. 521, although attachés of an embassy are held to be public ministers

The appellate jurisdiction of the Supreme Court is likewise limited in Art. III by the definition of the judicial power found in Section 2, cl. 1, so that, as we have just seen, no review will be undertaken of any matter which is not comprehended within the judicial power, e. g., it is not a case or controversy. Section 2, cl. 2 of that Article also sets forth the original jurisdiction in the Supreme Court, that is, since no other federal or state court has jurisdiction, there can be no appeal taken or heard. In all other cases, however, the Court does have appellate jurisdiction, but, states the clause, "with such Exceptions, and under such Regulations as the Congress shall make." This last quoted portion of Art. III is, of course, the greatest fount of limitation upon the power of judicial review. For the cases of original jurisdiction do not present many constitutional problems such as are brought up in the usual review of inferior determinations. A glance through any volume of the Court's reports will disclose that its original jurisdiction is invoked seldom, and then with few questions of constitutional law necessarily involved. Since Congress has the ability to control the Court's power of appellate review, and to this should be added the ability to create the inferior courts, then it may be concluded that Congress may, if it so desires, effectively nullify the power of judicial review.⁴⁴ That Congress has not done this is an excellent illustration of political self-control.

§ 39. — — Statutory Limitations Upon Judicial Review of Federal Tribunals—In General

One preliminary limitation, and two initial observations, are required: first, that we generally limit ourselves to civil matters and do not include criminal proceedings in these sections; sec-

while so attached. *Farnsworth v. Sanford* (C.C.A.Ga.1940) 115 F.2d 375; the consuls and vice consuls are, however, explicitly mentioned in subd. 1251(b).

44. See also note 35, *supra*; see e.g., the situation in *Ex Parte McCardle* (1868) 6 Wall. 318, 18 L.Ed. 816, (1869) 7 Wall. 506, 19 L.Ed. 264. These cases involved the post-Civil War Reconstruction Acts. In 1867 Congress broadened the appellate jurisdiction of the Supreme Court; the following year *McCardle's* case came up from the federal Circuit Court in Mississippi, and the Supreme Court assumed jurisdiction in 6 Wall. 318. The matter was argued in early March, the Court took it under advisement, and in late March the Congress, disregard-

ing the President's objections, repealed its 1867 legislation broadening the appellate jurisdiction of the Court. In 7 Wall. 506 the Supreme Court dismissed the case for lack of jurisdiction, even though it had originally so assumed it and had heard arguments on the appeal. See, also, *Ex Parte Yerger* (1868) 8 Wall. 85, 19 L.Ed. 332.

The states, of course, for their own acts within their own borders, and so long as the federal Constitution is not involved, may qualify any review to their own courts on state constitutional grounds. See, e.g., *Ohio ex rel. Bryant v. Akron Metropolitan Park Dist.* (1930) 281 U. S. 74, 50 S.Ct. 228, 74 L.Ed. 710, 66 A.L.R. 1460.

ond, that the old practice involving Supreme Court review has been re-cast not alone terminologically but also practically, the latter resulting in a broadening of the Court's discretion to accept or reject cases in which a right of review does not exist; and, third, that this discretionary, or certiorari, method of obtaining review is the most important of the three here discussed.

An "appeal" is utilized when the appellant has a right to the review, that is, the Supreme Court has no discretion to refuse to entertain the appeal.

A "petition for certiorari" is used when no right to an appeal exists and the petitioner now is in the position of a supplicant who must advance weighty reasons for moving the Court's discretion.

A "certified question" is used when a federal Court of Appeals (or the Court of Claims) desires instructions in any civil or criminal case before it, but this does not occur too often. Note that a litigant has no right to a certificate, and that it is only the court which can invoke this method.

Each of these three methods is discussed in the next three sections. One brief observation: in § 33, *supra*, the method of citing cases was discussed. Now, since we see that different methods of Supreme Court handling of cases are possible, just how are the names of the parties, i. e., the title of the cases, written and described? In an original jurisdiction case one party sues the other, so it is generally a plaintiff (or complainant) against a defendant, giving each party his or its full name in the official papers but, for citation use, shortening it but not beyond the point of recognition, e. g., an individual's last name only may be used. When there is an appeal then, regardless of who sued whom initially, or who sought review below from which the present appeal is taken, the person now appealing is named first and described as the appellant, the other party being termed the appellee; and when certiorari is sought, the same principles are followed save that the person seeking it is termed the petitioner, and the other is generally not termed the respondent in the title or caption of the reported case, but is always referred to in the opinion and elsewhere as such. For example, Wisconsin, Complainant, v. Illinois, Defendant, or Arizona, Plaintiff, v. California, Defendant; United States, Appellant, v. Proctor & Gamble Co., Appellee; Grimes, Petitioner, v. Raymond Concrete Pile Co.⁴⁵ For practical purposes, however, these terms are seldom

45. Respectively found in (1958) 355 U.S. 909, 78 S.Ct. 336, 2 L.Ed.2d 271; (1958) 357 U.S. 902, 78 S.Ct. 1146, 2 L.Ed.2d 1152; (1958) 356

U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077; (1958) 356 U.S. 252, 78 S.Ct. 687, 2 L.Ed.2d 737.

used in citations, just the shortened names of the parties, with string citations.⁴⁶

§ 40. — — — Appeal

There no longer exists the old "writ of error" and the term appeal is now used. The method of appeal is given in broad language in 28 U.S.C.A. § 1252 (also analyzed in § 45, *infra*), which speaks of an appeal "from an interlocutory or final judgment, decree or order of any court of the United States, [and others enumerated] . . . holding an Act of Congress unconstitutional in any civil action, suit or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party." In general, an appeal thus lies to the Supreme Court where: (1) a civil action etc. is involved; (2) the United States, etc. is a party;⁴⁷ (3) there is an interlocutory or final judgment, decree or order of any federal court; and (4) this judgment, etc. must hold a Congressional statute unconstitutional.⁴⁸ Under the "any court" language it is difficult to conceive of a judicial court to which the section does not apply, whether specifically within or without the enumeration of courts found therein. Furthermore, since the section opens with "Any party may appeal to the Supreme Court," it is not required that the appellant be the United States; so long as the above conditions are met then any losing party, whether private person or state government, may appeal.⁴⁹

§ 41. — — — Certiorari

Prior to the Judiciary Act of 1925 the Supreme Court was overburdened with appeals which presented little of novelty or

46. It should be noted that while the general method in vogue in the placement of a date is at the end of a string citation, this volume places it immediately after the title and before the string; not alone does the Supreme Court use this style (although commas, not parentheses, separate the date—parentheses are here used to prevent error), but the lower federal courts are following suit and it also makes for simplicity and ease, gives the reader an immediate time reference, and avoids confusion.

47. The United States may, under 28 U.S.C.A. § 2403, intervene in any suit to which it is not a party whenever a federal statute is questioned, and so long as this intervention permits it to present evidence and arguments, it may invoke the appeal procedure under § 1252. *International Ladies' Gar-*

ment Workers' Union v. Donnelly Garment Co. (1938) 304 U.S. 243, 58 S.Ct. 875, 82 L.Ed. 1316.

48. For example, if a District Court holds such an act unconstitutional, a direct appeal is thus possible under § 1252, bypassing the intermediate Court of Appeals, but if this lower court upholds such an act, and then the Court of Appeals reverses and denounces the statute, a direct appeal is now available from this latter holding. In such a situation, however, could not a party nevertheless seek certiorari, which unquestionably would be granted, and go up under § 1254, pertaining to appeals from the Court of Appeals? As seen in § 44, *infra*, this latter is questionable.

49. E.g., *United States v. Bekins* (1938) 304 U.S. 27, 58 S.Ct. 811, 82 L.Ed. 1137.

importance. Since then the Court has obtained much more control over whether, and what type of, matters should be permitted before it. An appeal as seen in § 40, *supra*, is mandatory upon the tribunal even though dismissals occur; but certiorari, as broadened in scope and now greatly discretionary with the Court, permitted excellent administrative control of the quantity (and quality) of the cases before it so that by 1930 the Court had disposed of all its business for the 1929 term.⁵⁰ This standard has since been successfully maintained.

Just what is certiorari? It certainly is not a device to give a defeated litigant a second turn at the appellate bat,⁵¹ and Part V of the Supreme Court Rules, entitled "Jurisdiction on Writ of Certiorari," in Rule 19, gives the "Considerations governing review on certiorari." Briefly, the Rule opens with "certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered." The reasons given⁵² set forth the general considerations which control the exercise of the Court's discretion in granting or denying certiorari.

Oral argument in certiorari petitions is seldom permitted, and the writ is granted when four of the Justices so vote (or, perhaps, two or three are very strongly of that opinion); when but six or seven Justices are available the number may be reduced to three. And even when granted the Court may thereafter, at any time, dismiss the writ as having been improvidently granted.⁵³ It is rare when reasons are given for the Court's decision, although many such instances do occur. The "denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times."⁵⁴ Mr. Justice Frankfurter has written that:

"A variety of considerations underlie denials of the writ, and as to the same petition different reasons may lead different Justices to the same result. This is especially true

50. A "term" of the Supreme Court begins on the first Monday in October and runs continuously through to the following June. For details on procedure and practice in the Supreme Court, see Stern & Gressman, *Supreme Court Practice* (1954, 2d ed.).

51. See e.g., Chief Justice Taft's statement in *Magnum Import Co. v. Coty* (1923) 262 U.S. 159, 163, 43 S. Ct. 531, 67 L.Ed. 922.

52. Rule 19, pars. 1(a) and (b), made applicable to other courts by par. 2.

53. See e.g., *Hammerstein v. Superior Court* (1951) 341 U.S. 491, 71 S. Ct. 820, 95 L.Ed. 1135, and also *United States v. Shannon* (1952) 342 U.S. 288, 294-295, 298, 72 S.Ct. 281, 96 L.Ed. 321.

54. *United States v. Carver* (1925) 260 U.S. 482, 490, 43 S.Ct. 181, 67 L.Ed. 361. *Contra*: dissent in *Brown v. Allen* (1953) 344 U.S. 443, 456, 73 S.Ct. 397, 97 L.Ed. 469.

of petitions for review on writ of certiorari to a State court. Narrowly technical reasons may lead to denials. Review may be sought too late; the judgment of the lower court may not be final; it may not be the judgment of a State court of last resort; the decision may be supportable as a matter of State law, not subject to review by this Court, even though the State court also passed on issues of federal law. A decision may satisfy all these technical requirements and yet may commend itself for review to fewer than four members of the Court. Pertinent considerations of judicial policy here come into play. A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening

. . . " 55

Some other factors entering into the granting of certiorari involve a direct conflict between the Courts of Appeal, or with the Court of Claims, or a state's highest court, so as to resolve it at the highest level; or a conflict in the decision sought to be reviewed and a Supreme Court one, especially where it involves a Court of Appeals determination; or where major and important issues are sought to be resolved. Reasons for a rejection of the writ are legion, e. g., a factual issue only is brought up, or a lower court error is all that is involved (although in the past few years the Court has reached into this area for the correction of glaring injustices), or a non-final judgment is sought to be reviewed.

§ 42. — — — Certified Question

As noted in § 39, *supra*, when a Court of Appeals (or the Court of Claims) is in doubt as to a point of law, and desires instructions, it may certify a question to the Supreme Court for a binding instruction. However, 28 U.S.C.A. § 1254(3) closes with the additional disjunctive power given to the Supreme Court, that, instead, it may "require the entire record to be sent up for decision of the entire matter in controversy."⁵⁶ Rule 28(1) of the Supreme Court Rules requires that the lower court's certificate "contain a statement of the nature of the cause and of the facts on which such question or proposition of law arises. Questions of fact cannot be certified. Only questions or propositions of law may be certified, and they must be distinct and definite." There are numerous principles which bear upon the certification

55. *Maryland v. Baltimore Radio Show* (1950) 338 U.S. 912, 917-920, 70 S.Ct. 252, 94 L.Ed 562.

56. This is the additional language found in § 1254(3), whereas § 1255

(2), which applies to the Court of Claims, follows generally § 1254(3) up to this extra power.

of law, e. g., the Court will not decide the whole case, although a definite and clean cut question of law will be answered even if decisive for the entire controversy; an academic question is rejected; ultimate, not evidentiary, facts must be stated, and nothing outside these certificated facts will be considered; certified mixed fact and law questions are not acceptable, as are not certified questions which are so broad and indefinite as to permit varying interpretations to be given the answers.⁵⁷

§ 43. — — — Procedures in These Methods—In Practice, Certiorari

The Rules of the Supreme Court, in Parts III, IV, V, and VI, set forth not alone the nature and concepts of original, appeal, certiorari, and certified question jurisdiction, but also give many procedures in these areas of review such as time for filing, the papers to be filed, fees, etc. These procedural details, therefore, may be easily referred to, and since it is certiorari jurisdiction which is most important, we concentrate upon that and also exclude the aforesaid filing of records, certifications thereof, etc.⁵⁸

Each Justice, about a week before a Saturday conference, receives a copy of the petition for a writ of certiorari and the briefs and records involved, together with opposing briefs, if any. The Justices are "not aided by oral arguments, and necessarily rely in an especial way upon petitions, replies, and supporting briefs. Unless these are carefully prepared, contain *appropriate* references to the record, and present with *studied accuracy, brevity and clearness* whatever is essential to ready and adequate understanding of points requiring our attention, the rights of interested parties may be prejudiced" ⁵⁹ At the conference the Chief Justice states the facts and issues as each matter is called for, gives his recommendation and then, in turn, beginning with the senior Justice, each comments, after which a vote is taken unless any Justice asks that the petition be deferred. The four-vote rule, as discussed in § 41, governs with

57. *Civil Aeronautics Board v. American Air Transport* (1952) 344 U.S. 4, 73 S.Ct. 2, 97 L.Ed. 4.

58. It may be noted that such procedural details are really detailed, e.g., Rule 39(1) requires "All records, petitions, motions and briefs, printed for the use of the court must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume, having 6 $\frac{1}{8}$ by 9 $\frac{1}{4}$ inches and type matter 4 $\frac{1}{6}$ by 7 $\frac{1}{6}$ inches, . . . [A]ll quotations contained therein, and the matter

appearing on the covers must be printed in clear type (never smaller than small pica or 11-point type) adequately leaded; and the paper must be opaque and unglazed" Rule 23 prescribes the form of the certiorari petition, which "shall contain in the order here indicated" eighteen differently divided and subdivided items.

59. *Furness, Withy & Co. v. Yang-Tsze Insurance Ass'n* (1917) 242 U.S. 430, 434, 37 S.Ct. 141, 61 L.Ed. 409.

dissents, etc. not recorded or noted save when so desired. Ordinarily a simple order of granting or denying will be entered the following Monday (or on a Monday decision day), although the Court may and frequently does limit the grant to one or more of the particular questions raised, or even to additional questions not raised by the parties.⁶⁰ At times the grant of certiorari may be accompanied by a determination of the merits, e. g., it will simultaneously reverse or vacate the judgment and remand but this occurs only when the decision is "clearly erroneous," or the petition has waited on the Court's determination of a like question.⁶¹ After a denial of Certiorari a defeated party may, under Rule 58(2), petition for a rehearing of the order, but the Rule confines the grounds "to intervening circumstances of substantial or controlling effect . . . or to other substantial grounds available to petitioner although not previously presented." Even though granted, a writ may be thereafter dismissed as having been improvidently granted. The respondent in a certiorari application may file additional certified portions of the record, an opposing brief, or, if he himself desires to reverse unfavorable items below, he must cross-petition on papers meeting all the requirements of a petitioner, save that he need not file a certified copy of the record which is on file.⁶² A reply brief by petitioner is permitted but not encouraged.

§ 44. — — Supreme Court Review of Determinations by the United States Courts of Appeal

The limitations upon and procedures for an appeal, certiorari, or certified question have already been discussed, and in this section we stress particular legal principles and rules which are applicable to this intermediate court. Regardless of how a matter comes before it, the Court of Appeals may have a federal or state statute up for a determination on constitutional ground. In the former instance 28 U.S.C.A. § 1252 applies, as we saw above in § 40, and an appeal lies to the Supreme Court; in the latter instance § 1254(2) permits a determination of unconstitu-

60. "We granted certiorari on a petition which tendered four questions. However, petitioner's counsel has now presented two additional questions We disapprove the practice of smuggling additional questions into a case after we grant certiorari." *Irvine v. California* (1954) 347 U.S. 128, 129, 74 S.Ct. 381, 98 L.Ed. 561.

61. See further *United States ex rel. Robinson v. Johnston* (1942) 316 U.S. 649, 62 S.Ct. 1301, 86 L. Ed. 1732; *Civil Aeronautics Board*

v. American Air Transport (1952) 344 U.S. 4, 73 S.Ct. 2, 97 L.Ed. 4; *United States v. Lane Motor Co.* (1953) 344 U.S. 630, 73 S.Ct. 459, 97 L.Ed. 622.

62. Rule 21(5), (6). He may file a conditional cross-petition, i.e., to be granted only if the other petition is granted, as in *McComb v. Jacksonville Paper Co.* (1948) 335 U.S. 809, 69 S.Ct. 38, 93 L.Ed. 365; *McComb v. Farmers Reservoir & Irr. Co.* (1949) 337 U.S. 755, 69 S.Ct. 1274, 93 L.Ed. 1672.

tionality to be reviewed by an appeal by any party who relied upon it, except that certiorari is now precluded if the appeal is taken,⁶³ and only the federal questions presented may be argued. Since the party may, instead, petition for a writ of certiorari, he has the option of a broader scope of Supreme Court review subject, however, to a discretionary denial or limitation. For an appeal, there must be a direct finding of a conflict between the state and the federal law, and included in the "state law" are all state constitutional, legislative, municipal, and administrative provisions, statutes, ordinances, determinations, etc.; a non-appealable and independent ground upon which the court's decision also rests, besides that of unconstitutionality, precludes the use of appeal; the Supreme Court has no power to treat the appeal, if improvidently taken, as a petition for certiorari, although if a determination by a state's highest tribunal is appealed, such a power does exist (see § 49, *infra*). The certified question, and certiorari petitions, have already been treated in §§ 41-42, but these additional points concerning certiorari may be made: a direct conflict between a Court of Appeals and the Court of Claims may be so resolved, although not where it is a district court determination;⁶⁴ or where the conflict is with a state's highest court on a federal question, but as to a non-federal and general matter, the general rule is to deny certiorari; in patent cases, absent a conflict between Circuits, certiorari will ordinarily not be granted;⁶⁵ the Court of Appeals for the District of Columbia is treated in two aspects: first, as another Circuit Court, so that all limitations, etc. applicable to these courts are applicable to it, and, second, as if it were a state's highest court when local matters and local (Congressional) states are involved.⁶⁶

§ 45. — — Supreme Court Direct Review of Determinations by District Courts

The usual and ordinary method of reviewing a determination of a federal District Court is through a Court of Appeals. There are, generally, two overall instances when a direct review by the Supreme Court is possible. The first involves a direct ap-

63. Except that if improvidently taken, and the appeal is dismissed, certiorari may be utilized, if timely, *Bradford Electric Light Co. v. Clapper* (1931) 284 U.S. 221, 52 S. Ct. 118, 76 L.Ed. 254. The converse is also true. *Ott v. Mississippi Val. Barge Line* (1949) 336 U.S. 169, 69 S.Ct. 432, 93 L.Ed. 585.

64. For an exception to this rule, see *Gulf States Steel Co. v. United States* (1932) 287 U.S. 32, 53 S.Ct. 69, 77 L.Ed. 150.

65. Except, e.g., where a matter of unusual and great public importance is involved, *Marconi Wireless Tel. Co. v. United States* (1943) 320 U.S. 1, 63 S.Ct. 1393, 87 L.Ed. 1731.

66. See, e.g., *Del Vecchio v. Bowers* (1935) 296 U.S. 280, 56 S.Ct. 190, 80 L.Ed. 229, and cf. *District of Columbia v. Little* (1950) 339 U.S. 1, 70 S.Ct. 468, 94 L.Ed. 599, but see *District of Columbia v. John R. Thompson Co., Inc.* (1953) 346 U.S. 100, 73 S.Ct. 1007, 97 L.Ed. 1480.

peal in special instances, and the second involves a direct appeal from a three-judge statutory court. This section deals with the first such instance, and § 46 with the second.

The basic judicial statute here considered is 28 U.S.C.A. § 1252 (in criminal matters, 18 U.S.C.A. § 3731) as well as certain special provisions in three other federal laws. Under § 1252 "Any party" may go up on appeal "from an interlocutory or final judgment, decree or order of any court of the United States, the District Court for" the Canal Zone and the Virgin Islands, "and any court of record of . . . Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit or proceeding to which the United States or any of its agencies, or any officer of employee thereof, as such officer of an employee, is a party." In § 40, *supra*, we saw that there were four requirements before this statute could be availed of in any appeal; here, in direct appeals the following must be added: (5) the judgment, etc. must emanate from one of the enumerated or covered tribunals. In addition to this basic statute there are special instances where direct appeals are available: (1) under 15 U.S.C.A. § 29, any civil action brought in any district court by the United States under the antitrust laws, "an appeal from the final judgment of the district court will lie only to the Supreme Court;"⁶⁷ (2) similarly, 49 U.S.C.A. §§ 45-46 provide for such direct appeals under Chapters 1, 8, and 12 of the Interstate Commerce Commission Act, and (3) under like provisions made applicable by 47 U.S.C.A. § 401(d) to civil suits to enforce the carrier provisions, i. e., §§ 201-222, of the Federal Communications Act. It is not alone necessary that a determination be final, but interlocutory orders may not be appealed to any Court of Appeals.⁶⁸

§ 46. — — — Supreme Court Direct Review of Determinations by Three-Judge Statutory Courts

The basic statute here is 28 U.S.C.A. § 1253, which permits "any party" to take a direct "appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." The key word here is "required," and this immediately distinguishes this section from § 1252, discussed in §§ 40 and 44, *supra*, especially since no question of constitutionality of a Congressional statute is in-

67. Under 15 U.S.C.A. § 28, identical in form with the Expediting Act of 1903, the Attorney-General may obtain a hearing by a three-judge court. On this, see § 46, *infra*.

68. E. g., *Allen Calculators v. National Cash Register Co.* (1944) 322 U. S. 137, 64 S.Ct. 905, 88 L.Ed. 1188.

volved. The three-judge court is required where any suit is brought to restrain the enforcement, operation or execution of any federal or state statute on a claim of unconstitutionality, "or of an order made by an administrative board or commission acting under State statutes," (§§ 2281-2282), or of an order of the Interstate Commerce Commission (§ 2325). Under § 2284, the district judge to whom the application for an injunction or other relief is made must immediately notify the Chief Judge of the Circuit; this aforesaid district judge "shall constitute one member of such court;" the Chief Judge thereupon designates two other judges, "at least one of whom shall be a circuit judge." Thus at least one of the three judges must be a district judge, and at least one must be a circuit judge; apparently the Chief Judge has the option of determining whether the third judge shall be a district or circuit judge (assuming no Supreme Court Justice is involved).⁶⁹ The Supreme Court is not too anxious that three-judge courts be constituted and has construed the pertinent statutes narrowly; ⁷⁰ thus a substantial constitutional question must be raised, and the district court need not proceed with the composition of the three-judge court when it lacks jurisdiction of the case, or when the state courts provide an adequate remedy.⁷¹ Where it is necessary that a three-judge court sit, then neither a single judge nor a quorum of two may act, e. g., to dismiss a complaint as insufficient, or grant or deny any type of injunction.⁷²

§ 47. — — Other Federal Courts—In Particular

Several other courts have been somewhat mentioned to this point, e. g., the Court of Claims, and in this section we treat of tribunals other than those mentioned heretofore. The jurisdiction of the Court of Claims is found in 28 U.S.C.A. §§ 1491-1505 and, insofar as the court exercises a judicial power then to that extent may the Supreme Court, if it so desires, review on certiorari pursuant to § 1255(1). This court today is a constitutional one so that any non-judicial functions may be denounced

69. Section 2284 then continues at length to give the procedural details for granting orders, holding hearings, etc.

70. E.g., *Phillips v. United States* (1941) 312 U.S. 246, 61 S.Ct. 480, 85 L.Ed. 800.

71. *California Water Service Co. v. City of Redding* (1938) 304 U.S. 252, 58 S.Ct. 865, 82 L.Ed. 1323, *Osage Indians v. United States* (D. C.D.C.1942) 45 F.Supp. 179. On the question of the interpretation

of a state statute, where the state interpreting bodies have not spoken, see 28 U.S.C.A. § 2284. On the remedy, see *Alabama Commission v. Southern R. Co.* (1951) 341 U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002.

72. *Stratton v. St. Louis Southwestern R. Co.* (1930) 282 U.S. 10, 51 S.Ct. 8, 75 L.Ed. 135, *Ayrshire Collieries Corp. v. United States* (1947) 331 U.S. 132, 67 S.Ct. 1168, 91 L.Ed. 1391. When a three-judge court does sit, however, a majority of two may decide.

when the question is brought up.⁷³ An appeal is possible under § 1252 (see § 40, *supra*), and the certified question technique is available to it also (§ 42, *supra*). The Court of Customs and Patent Appeals is a legislative, not a constitutional, court, so that it may be given jurisdiction over both judicial and non-judicial matters; in the latter situation no certiorari under its basic review statute, 28 U.S.C.A. § 1256, is possible.⁷⁴ For example, in reviewing decisions of the Customs Court, the Court of Customs and Patent Appeals acts judicially, but not when the Patent Office appeals are brought up, for then it acts administratively.⁷⁵ Under § 1252 (§ 40, *supra*) a direct appeal is available.

§ 48. — — Supreme Court Review of Determinations by Administrative Bodies—In General

In the preceding section we saw that the Court of Customs and Patent Appeals was, to the extent that it reviewed matters from the Patent Office, acting in an administrative capacity, and that under its basic statute no certiorari was possible. Since the procedure in the federal jurisdiction is for administrative determinations to be proceeded against or processed by the federal district or a Court of Appeals, whichever is applicable,⁷⁶ a direct appeal to or review on certiorari by the Supreme Court is not possible. However, there is still open the question whether a state administrative body's quasi-judicial determination, which the state may make non-reviewable in and by a state court, should not be reviewed by the Supreme Court.

§ 49. — — Statutory Limitations Upon Judicial Review of State Tribunals—In General—Appeal and Certiorari

The basic statute for Supreme Court review of state court decisions is 28 U.S.C.A. § 1257. This section permits an appeal (1) where a treaty or federal statute is denounced or, (2) a state statute is upheld as against its claimed invalidity because of its repugnancy to the federal Constitution, etc.; in subd. (3) a writ of certiorari is permitted where either of the first two subdivisions does not apply because the decision has not been against the federal laws, "or where any title, right, privilege or immunity

73. See *Williams v. United States* (1933) 289 U.S. 553, 53 S.Ct. 751, 77 L.Ed. 1372, overturned by 28 U.S.C.A. § 171, rendering § 1492 doubtful (it permits advisory opinions). See also *Muskraat v. United States*, *supra* note 42.

74. *Postum Cereal Co. v. California Fig Nut Co.* (1921) 272 U.S. 693, 47 S.Ct. 284, 71 L.Ed. 478.

75. *Ibid.*, and see also *McBride v. Teeple* (1940) 311 U.S. 649, 61 S.Ct. 8, 85 L.Ed. 415.

76. On this see Forkosch, *A Treatise on Administrative Law* (1956) Chap. XVII. In Chap. IX, *infra*, esp. § 191, more on this subject is given.

is specially set up or claimed under the Constitution," etc. A state's highest court must pass directly upon the particular question and directly hold against the federal Constitution, etc. in either situation (1) or (2) above, whether the Constitution, etc. is denounced in whole or in part being immaterial. In general, it is the second of the above two situations which is the usual one presented to the Supreme Court for appeal, and a "statute" includes every legislative act which has the force of law. Thus the state constitution, or a municipality's ordinances, or an administrative agency's quasi-legislative orders, are comprehended within the term. A statute may be attacked "upon its face," i. e., without having been applied to a particular fact-situation, or it may be attacked "as applied," i. e., in and to a particular fact-situation; in both instances if any construction is required because of statutory ambiguity, etc., the Supreme Court (and all federal courts) must defer to, and accept, the construction placed upon the state statute by the state's highest court. In the first instance the statute, as so construed, is *per se* to be held good or bad in any and all situations; in the second instance the statute (as construed and) as applied, may be denounced in one fact-situation, upheld in another, etc. The certiorari power, under the third subdivision of § 1257, permits this method in three instances, the first two being patterned upon the appeal procedure in subds. 1 and 2, but without a requirement of federal invalidity, while the third instance involves a claimed title, etc. under a federal law, etc. This last subdivision runs the gamut of federal questions in a state suit. In a holding of unconstitutionality by a state court of a state statute review is only by certiorari, as may be the case when a federal statute is upheld; a federal-state conflict on a question of federal law or statutory interpretation will generally result in certiorari, as will a conflict between two states on a federal question, or even without a conflict where a substantial federal matter is involved.⁷⁷

§ 50. — — — The Requirement of Highest State Court Determination.

In the preceding section no emphasis was placed upon the express limitation set forth in 28 U.S.C.A. § 1257, namely, that it was a final judgment or decree "rendered by the highest court of a state in which a decision could be had," which is reviewable by appeal or certiorari.⁷⁸ What does "highest" state court mean?

77. *MacGregor v. Westinghouse Co.* (1947) 329 U.S. 402, 67 S.Ct. 421, 91 L.Ed. 380, discussed in Forkosh, *A Treatise on Administrative Law* (1956) § 317; *Tomkins v. Missouri* (1945) 323 U.S. 485, 65 S.Ct. 370, 89 L.Ed. 407.

78. Thus it is possible that private litigants may argue a constitutional question in the lower courts, not appeal further, and a superficially "binding" interpretation occur but this, of course, is not *stare decisis*.

For example, an intermediate state court's determination is final if, by state law: it is non-reviewable or a discretionary review is refused; or where a *nisi prius* judgment is made non-reviewable; or where the trial judgment is made non-reviewable on a federal question although non-final, and therefore appealable to a higher state court, in its non-federal aspects.⁷⁹ However, a judgment by a division of a state's highest court, where *en banc* review is possible and available, is not reviewable.⁸⁰

§ 51. — — — The Requirement of Finality

In the preceding two sections the basic statute for Supreme Court review, namely, 28 U.S.C.A. § 1257, was discussed. That statute opens, "Final judgments or decrees" etc. In other words, a nonfinal judgment or decree is not covered by § 1257 and is thus not reviewable. The term "final" is interpreted by the Supreme Court to mean that: "It must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."⁸¹ These two types of finality are conjunctives, not disjunctives, so that both must be present. The finality must extend to everything, issues and parties, and not merely a part, although when a matter is separate and distinct from the general subject in litigation and affects only the particular parties thereto, then a conclusive determination thereof is considered final.⁸² However, it is up to the Supreme Court, in each case, to determine whether finality is or is not there found, and so the record brought up for review thus must disclose this final judgment or decree, although the opinion of the court and all other circumstances bearing upon the question of finality will be checked.⁸³ If a state court judgment or decree requires other things to be done then, generally, it is not final for review purposes,⁸⁴ nor is it final when alternative choices are permitted to comply with an order directing action, some of which may result in additional proceedings.⁸⁵ Injunction proceedings are final only when there is an effective

79. E. g., *Woods v. Nierstheimer* (1946) 328 U.S. 211, 66 S.Ct. 996, 90 L.Ed. 1177.

80. *Union National Bank v. Lamb* (1949) 337 U.S. 38, 69 S.Ct. 911, 93 L.Ed. 1190.

81. *Market Street R. Co. v. Railroad Commission* (1945) 324 U.S. 548, 551, 65 S.Ct. 770, 89 L.Ed. 1171.

82. *Clark v. Willard* (1934) 292 U.S. 112, 54 S.Ct. 615, 78 L.Ed. 1160.

83. *Gersch v. Chicago* (1913) 226 U.S. 451, 33 S.Ct. 178, 57 L.Ed. 295;

Richfield Oil Corp. v. State Board (1946) 329 U.S. 69, 67 S.Ct. 156, 91 L.Ed. 80; *Gospel Army v. Los Angeles* (1947) 331 U.S. 543, 67 S.Ct. 1428, 91 L.Ed. 1662.

84. See, however, *Radio Station WOW v. Johnson* (1945) 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 2090, where a subsequent accounting may be deemed severed.

85. *Republic Natural Gas Co. v. Oklahoma* (1948) 334 U.S. 62, 68 S.Ct. 972, 92 L.Ed. 1212.

disposition of the action, and in administrative proceedings reviewed by a state's highest court this body must finally adjudicate on a completed matter for the Supreme Court to be able to review.⁸⁶ If a rehearing is available and a petition therefor is presented to a state court within the time limited, no final judgment is present, although when the time has not expired and no petition has yet been filed the Supreme Court holds that a final judgment is nevertheless present for purposes of review.⁸⁷

§ 52. — — — The Requirement of a Substantial Federal Question—Non-federal Ground

The basic § 1257, examined intensively in the preceding section, does not contain any express requirement that the federal question presented must be a "substantial" one. That term nowhere appears in the section but has been engrafted by the judiciary because of its reasonableness as an implied condition or modifier. Thus not every mere allegation of a federal question is sufficient. Additionally, "federal facts" must appear.

" 'There must be a real substantive question on which the case may be made to turn,' that is, 'a real, and not a merely formal, question is essential to the jurisdiction of this court.' Stated in another form, the doctrine thus declared is, that although, in considering a motion to dismiss, it be found that a question adequate, abstractly considered, to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy, the motion to dismiss will prevail. . . . The power, however, to dismiss because of the want of substantiality in the claim upon which the assertion of jurisdiction is predicated, does not apply to cases where the subject-matter of the controversy, is *per se* and inherently Federal" ⁸⁸

The federal question must be raised and presented at the trial level if state procedure so requires, otherwise Supreme Court review may be precluded; it must be distinctly and positively presented in all subsequent courts although the state's highest court may "dispense" with these lower court time-and-place requirements; Supreme Court review is limited to these specific questions as so raised.⁸⁹ If there is a non-federal ground upon which the

86. *Williams v. Quill* (1938) 303 U. S. 621, 58 S.Ct. 648, 82 L.Ed. 1084, *Rochester Telephone Corp. v. United States* (1939) 307 U.S. 125, 59 S. Ct. 754, 83 L.Ed. 1147.

87. *Chicago G. W. R. Co. v. Basham* (1919) 249 U.S. 164, 39 S.Ct. 213,

63 L.Ed. 534, *Market Street R. Co. v. Railroad Com'n*, *supra* note 81.

88. *Equitable Life Assur. Society v. Brown* (1902) 187 U.S. 308, 311, 23 S.Ct. 123, 47 L.Ed. 190.

89. *E. g., Stenbridge v. Georgia* (1952) 343 U.S. 541, 72 S.Ct. 834, 96 L.Ed. 1130.

state final judgment may be adequately and independently sustained, then even though the state court may have decided a federal question erroneously, the Supreme Court will not review. "The reason . . . [is] if the same judgment would be rendered by the state court after we corrected its view of Federal laws, our review could amount to nothing more than an advisory opinion."⁹⁰

§ 53. — — Judicially Self-Imposed Limitations—In General

In the preceding section we saw that while the term "substantial" does not appear in § 1257, the Supreme Court has engrafted it upon that basic statute. Further, the non-federal ground, as a limitation, is also one which is not found in any statute but has been imposed upon itself by the Supreme Court. In other words, separate and apart from those constitutional and statutory limitations upon the power of the Court to review federal and state actions which have been discussed heretofore, are those self-imposed limitations for which only the Court's own sense of the "gravity and delicacy" of its function⁹¹ are responsible. The power \longleftrightarrow limitation concept thus finds that the constitutional and statutory limitations already reviewed are not sufficiently extensive and intensive to do more than slightly circumscribe the power of judicial review. The unwise exercise of this great balance of power most assuredly would have brought statutory, if not constitutional, reform, but "the Court's power has been maintained by a wise refusal to employ it in unequal combat."⁹² This "wise refusal" has been expressed in many opinions and decisions, and from these the Supreme Court's self-imposed limitations upon its power of judicial review may be culled. But since these are discretionary, it is always possible, in a particular case and upon particular facts, either to ignore these limitations or find they are not applicable. However with a minor exception or two, these self-imposed limitations are observed rather carefully by the Court.

§ 54. — — — In Particular

The judicially self-imposed limitations of the Supreme Court upon its power of judicial review are too numerous to be given in every detail. A good many have already been set forth, and even the following do not complete the discussion. The by-now

90. *Herb v. Pitcairn* (1945) 324 U.S. 117, 126, 65 S.Ct. 459, 89 L.Ed. 789. There are many aspects of this non-federal ground which are not here treated.

91. *Ashwander v. T. V. A.* (1936) 297 U.S. 288, 324, 56 S.Ct. 466, 80 L. Ed. 688.

92. *Roche*, *Judicial Self-Restraint*, 49 *Amer. Polit. Sci. Rev.* 722 (1955).

classic statement of Mr. Justice Brandeis is a good jumping-off place:

"The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are:

1. The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary proceeding

. . . .

2. The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.

. . . .

3. The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'⁹³

4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of [i. e. a question of statutory construction or general law].

5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. . . .

6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits. . . .

7. 'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the questions may be avoided.'

. . . . " ⁹⁴

One of the most important of these self-imposed rules is the "political question" one, i. e., the Court will refuse to decide a question because it is a political one.⁹⁵ This is a queasy term, for what is and what is not a political question is for the Court to decide in each case brought up. Professor Corwin has summarized these as follows:

"The more common classifications of cases involving political questions are: (1) those which raise the issue of what proof

93. See, however, the exception by Holmes in *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 414, 43 S.Ct. 158, 67 L.Ed. 322, 28 A.L.R. 1321.

94. *Ashwander v. T. V. A.* (1936) 297 U.S. 288, 346-348, 56 S.Ct. 466, 80 L.Ed. 688.

95. See, e. g., *Marbury v. Madison* (1803) 1 Cr. 137, 170, 2 L.Ed. 60.

is required that a statute has been enacted, or a constitutional amendment ratified; (2) questions arising out of the conduct of foreign relations; (3) the termination of wars, or rebellions; the questions of what constitutes a republican form of government, and the right of a state to protection against invasion or domestic violence; questions arising out of political actions of States in determining the mode of choosing presidential electors, State officials, and reapportionment of districts for Congressional representation; and suits brought by States to test their political and so-called sovereign rights. . . . " 96

There are many other concepts available to the Court if it desires to refuse a review, e. g., the doctrine of resolving any reasonable doubt in favor of constitutionality, the premature bringing of cases, that collusion is involved, the exhaustion doctrine, the primary jurisdiction procedure, the standing-to-sue requirement, the ripeness doctrine, the refusal to pass upon constitutionality only when necessary to determine the merits or if an alternative and non-constitutional ground is available, the doctrine of abstention.⁹⁷

96. Corwin ed., *The Constitution of the United States of America* (1953) p. 547. See, further, Frank, "Political Questions," in *Supreme Court and Supreme Law* (1954), Cahn, ed., p. 37, that this doctrine is "a magical formula which has the practical result of relieving a court of the necessity of thinking further about a particular problem. It is a device for transferring the responsibility for decisions of questions to another branch of the government; and it may sometimes operate to leave a problem in mid-air so that no branch decides it." See also § 462, *infra*, where the 1962 Reapportionment Case is discussed.

97. See, e. g., *McCarroll v. Dixie Greyhound Lines* (1940) 309 U.S. 176, 60 S.Ct. 504, 84 L.Ed. 683 (dissent by Justices Black, Frankfurter, and Douglas). The doctrine of abstention is one "whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state government' and for the smooth working of the federal judiciary." *Railroad Com'n of Texas v. Pullman Co.* (1941) 312 U.S. 946, 501, 61 S.Ct. 643, 85 L.Ed. 971, discussed in detail in *Empire Pictures Distributing Co. v. City of Fort Worth* (5th Cir. 1960) 273 F. 2d 529, 531-540.

Chapter III

THE FEDERAL SYSTEM IN PRACTICE

§ 60. Introduction—Analysis of Federalism

The term "state" both in international law and in political science signifies a nation. We, however, use the term to distinguish the fifty sovereign bodies, which today comprise the United States of America, from the national or federal government.¹ These "indestructible states" compose "an indestructible union,"² for the Constitution presupposes the continued existence of the states functioning in co-ordination with the national government.³ The federal system here is therefore one in which two sovereign powers, i. e., states on one side and the federal government on the other, are indissolubly united by a written document which formulates a legal relationship under which they function. Persons and property within the states thus exist under "the complex character of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each within its sphere of action, prescribed by the Constitution of the United States, independent of the. . . ."⁴ In other nations, both past and present, other forms of federalism may be found,⁵ differing in kind and in quality so that our peculiar system cannot be analogized to them but must be studied independently. Furthermore, and because of the Constitutional basis, both sovereigns must be understood *vis-a-vis* each other, then the states themselves *vis-a-vis* each other, and, finally, the federal and state governments separately *vis-a-vis* persons. We discuss first the cooperation between the two types of sovereigns (§§ 61-63) and their differ-

1. The colonies were, of course, never recognized by other nations as sovereign bodies; with the outbreak of hostilities the First Continental Congress spoke for them internationally, then the Articles of Confederation had the federal government doing this, and finally the Constitution continued it. Thus the colonies-turned-states were never recognized as sovereigns by other nations.

2. *Texas v. White* (1869) 7 Wall. 700, 725, 19 L.Ed. 227.

3. See also *State of New York v. United States* (1946) 326 U.S. 572, 575, 66 S.Ct. 310, 90 L.Ed. 326, per Frankfurter, J.: "[O]urs is a fed-

eral constitutional system, as expressly recognized in the Tenth Amendment," although compare his views on the Tenth with those of Mr. Justice Stone, in note 22, *infra*.

4. *Abelman v. Booth* (1859) 21 How. 506, 523, 16 L.Ed. 169. Within the District of Columbia, its territories and its possessions, the United States is, of course, supreme.

5. See, e. g., Forkosch, review of Wagner, *The Federal States and Their Judiciary* (1959) in 8 *Wayne Law Rev.* 358 (1962); see also Wildavsky, *Party Discipline Under Federalism*, 28 *Social Research* 437 (1961).

ences (§§ 64–71), the differences among the states (§§ 72–77), and, finally, but in a limited manner, persons versus states (§§ 78–81). This last is so limited because Part C is devoted to the rights of persons against both sovereigns, so that but a few Constitutional clauses are presently involved.

§ 61. Federal Action in Conjunction With the Individual States —In General

Most commentators speak of the “versus” part of our two sovereigns, overlooking or ignoring the “pro” aspects. There necessarily must be much of cooperation because each sovereign cannot help but live with the other and therefore accommodations must occur; in addition, and because neither government is itself possessed of the total powers a nation *per se* has, both must cooperate, when for example, war occurs; also, there has to be economic and social cooperation in many areas, e. g., federal grants-in-aid to the states for many purposes.⁶ This cooperation is examined in the political and economic aspects in the following two sections. There is, however, an additional phase of federal-state relations which does not partake of either cooperation or rejection, but is simply action in and on the same person or conduct. “We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. Each may, without interference by the other, enact laws . . . with the limitation that no legislation can give validity to acts prohibited by the [Constitution]. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.”⁷ Thus a state’s prosecution and punishment under its prohibition laws does not prevent the federal government’s like prosecution and punishment under its own laws, and double jeopardy is not involved.

§ 62. — In Particular—Politically—A Republican Form of Government

The states cooperate with the federal government in several ways under the Constitution. For example, under Art. I, § 4 (as amended by the 17th Amendment), they aid in the election of Congressmen through state machinery, although “the Congress may at any time by Law make or alter such Regulations . . .,” and under Art. I, § 2, cl. 1 and 2, provide the qualifications and requirements of Congressmen; they act under Art. II, § 1 (as

6. For additional illustrations of federal-state cooperation, see Forkosh, *A Treatise on Labor Law* (1958) Chaps. I–IV.

7. *United States v. Lanza* (1922) 260 U.S. 377, 382, 43 S.Ct. 141, 67 L.Ed. 314. See also *Screws v. United States* (1945) 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495.

amended or superseded by the 12th Amendment) in the election of the President, and Art. V involves the states in the amending provisions. By virtue of the Supremacy Clause they also effectuate federal laws through their judicial system,⁸ ceded territory for the federal capital (Art. I, § 8, cl. 17), etc.⁹ We concentrate upon other Constitutional provisions.

States are not alone a guaranteed part of the federal system in theory but, in numerous places in the Constitution, are referred to and depended upon by, and, conversely, depend upon, the national government. For example, the Federal (4th) Article aids one state by requiring the others to give full faith and credit to the first state's public acts, records, and judicial proceedings (§ 76, *infra*); states may likewise cooperate under the Article's Extradition or Rendition Clause (see § 75); state citizens, when traveling, are entitled to the same privileges and immunities in other states that these give to their own citizens (see § 80). Furthermore, under the Compact Clause found in Art. I, § 10, cl. 3, the consent of Congress is required before two or more states may "enter into any agreement or compact" between or among themselves, or with a foreign power (see § 74). In particular, § 4 of the Federal Article has a positive "guarantee to every State in this Union [of] a Republican Form of Government" by the United States and, in addition, the federal government must "protect each of them against Invasion . . . [and] against domestic Violence "Under this provision the states are permitted a wide choice, but a pure democracy in which all the eligible people meet and vote directly is not guaranteed;¹⁰ but exactly what is to be defined as republican? Historically it does not include universal suffrage, for none of the original colonies granted this, so that a denial of the vote to women could not be challenged,¹¹ at least not until the ratification of the pure democracy protected by the New England town meetings, for this

8. *Testa v. Katt* (1947) 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (an assumed penal statute). In *Prigg v. Pennsylvania* (1842) 16 Pet. 539, 615, 10 L.Ed. 1060, it was held that states could not be compelled to enforce federal law, although later the Supreme Court permitted this on a voluntary basis. *Robertson v. Baldwin* (1897) 165 U.S. 275, 17 S.Ct. 326, 41 L.Ed. 715. The *Prigg* case enunciates the concept of separate sovereignties, implicitly repudiated in *Claffin v. Houseman* (1876) 93 U.S. 130, 23 L.Ed. 833, and laid to rest by the *Testa* case.

9. *Naturalization of aliens, Holmgren v. United States* (1910) 217 U.S. 509, 30 S.Ct. 588, 54 L.Ed. 861;

eminent domain proceedings, United States v. Jones (1883) 109 U.S. 513, 3 S.Ct. 346, 27 L.Ed. 1015; arrest for a federal offense, *Robertson v. Baldwin* (1897) 165 U.S. 275, 17 S.Ct. 326, 41 L.Ed. 715.

10. A state may, of course, adopt a democratic or other non-republican form of government; what can the federal government do to prevent or disapprove of it? In practical constitutional theory, nothing, but in actuality much, e. g., withhold grants, other forms of aid and otherwise "ostracize" the recusant state.

11. *Minor v. Happersett* (1875) 21 Wall. 162, 22 L.Ed. 627.

was on a highly local level; nor does it mean that every state must conform to the (majority of) others. The definition is for the people to make, and then for Congress, not the courts, to approve, for it is a political decision or question which is involved.¹² So, Congress may accept or reject a state's representatives who seek to be seated, and the President may refuse to honor a state's request for aid in quelling domestic violence.¹³ So, too, may a state be deprived of federal "services," e. g., under the federal postal power, and the enforcement of the Hatch Act does not result in a denial to a state of a republican form of government.¹⁴

§ 63. — — Economically

The federal government cooperates with the states economically in many ways (although it is also true that the states likewise return such cooperation). For example, Congress has statutorily deprived federal district courts of practically all jurisdiction to restrain state administrative and utility rate orders, or the assessment, levy and collection of state taxes, where the state furnishes a sufficient remedy, and a federal three-judge statutory court must be convened to issue an interlocutory injunction restraining the execution of state administrative orders or statutes.¹⁵ The most widely known federal methods of cooperation are the provisions in the Social Security Act, for example, old age assistance, aid to the needy blind and to dependent children, assistance for the permanently and totally disabled, maternal and child-health services, services for crippled children, child-welfare services, and public health cooperation.¹⁶ The federal government makes financial grants to the states in the aid of their own approved laws in these programs. There are also the tax provisions in the unemployment insurance laws permitting employers in approved states to deduct most of their state tax payments from their federal unemployment taxes. Insofar as the individual states cannot run their own social security insurance programs, the federal government's Old Age and Survivor's Insurance program relieves the fifty states from this burden. Other forms of direct federal assistance are: federal funds, up to 90% of interstate or feeder highway costs, guaranteed to states under

12. *Luther v. Borden* (1849) 7 How. 1, 12 L.Ed. 581; see also note 14 *infra*.

13. The President's determination is not reviewable by the Courts. *Ibid*.

14. *Palmer v. U. S. Civil Service Commission* (7th Cir.1962) 297 F.2d 450, quoting also, at p. 454, from *Harisiades v. Shaughnessy* (1952) 342 U.S. 580, 589, 72 S.Ct. 512, 96 L.Ed. 586: "Such matters are so

exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."

15. 28 U.S.C.A. §§ 1341, 1342, 2281.

16. See, for greater discussion of these and others mentioned, Forkosch, *Labor Law*, *supra* note 6, §§ 33-41. For the old age and unemployment provisions, see §§ 53-54.

certain conditions; building constructions aided;¹⁷ state bonds not subjected to federal taxation. It is true, however, that such an "offer of benefits to a state by the United States [is made] dependent upon cooperation by the state with federal plans, assumedly for the general welfare, [but this] is not usual."¹⁸ There are also indirect methods of federal economic cooperation. For example, federal laws which regulate the interstate movement of goods favor certain states,¹⁹ although federal control of railroads and their rates enable all of the states to avoid the historic economic squeeze their constituents early suffered.²⁰

§ 64. The United States Versus the Individual States—In General

The political and judicial theory upon which the nation was founded envisioned cooperation, rather than friction, between the two sovereigns then created. "The Constitution in all its provisions looks to an indestructible union composed of indestructible states,"²¹ so that the preservation and the maintenance of the sovereignty of the states is as much the concern of the federal government as is the preservation and maintenance of the federal government the concern of the states. But, when two equals co-exist, one eventually becomes more equal. For example, the 10th Amendment states that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Superficially, this limits the federal government to those powers the Constitution, as judicially interpreted of course, grants, and it would therefore appear as if the states would otherwise be superior. However, the Supreme Court has stated that this Amendment does not deprive "the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end,"²² so that

17. The federal government, through the judiciary, aids state efforts to enforce non-discriminatory policies where federal funds are not directly involved. See, e. g., *Shelley v. Kraemer* (1948) 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161.

18. *Oklahoma v. United States Civil Service Commission* (1947) 330 U.S. 127, 144, 67 S.Ct. 544, 91 L.Ed. 794.

19. E. g., as was the case in oleomargarine which permitted a state to forbid its sale when colored to resemble butter, *Plumley v. Massachusetts* (1894) 155 U.S. 461, 15 S.Ct. 154, 39 L.Ed. 223, or upholding a state's prohibition laws prior to

the 21st Amendment, *in re Rahrer* (1891) 140 U.S. 545, 11 S.Ct. 865, 35 L.Ed. 572, although in these cases the state's police power was also involved.

20. See Forkosch, *Antitrust and the Consumer* (1956) Chap. III, for the background and cases involved in *The Granger Cases*, *Munn v. Illinois* (1877) 94 U.S. 113, 24 L.Ed. 77.

21. *Texas v. White* (1869) 7 Wall. 700, 725, 19 L.Ed. 227.

22. *United States v. Darby Lumber Co.* (1941) 312 U.S. 100, 124, 61 S.Ct. 451, 85 L.Ed. 614. Mr. Justice Stone also wrote: "Our conclusion is unaffected by the Tenth

difficulties concerning equality ensue. The range of these difficulties is co-extensive with the functionings of the governments, so that merely illustrative sections follow in the respective areas mentioned.

§ 65. — In Particular—Politically

A new state, once admitted by Congress under Art. IV, § 3, cl. 1, is thereafter politically co-equal with the thirteen original states, and her sovereignty and powers cannot be questioned.²³ There are specific constitutional limitations, however, upon such political power, e. g., the Compact Clause (§ 74, *infra*), the Full Faith and Credit Clause (§ 76, *infra*), but there are others which flow from grants of powers to the federal government which, when utilized, also limit a state. Under Art. I, § 4, cl. 1, the states prescribe the time, place, and manner of holding elections for Congressmen, subject to the power of Congress to "make or alter such Regulations, except as to the Places of chusing Senators." Since this federal power is limited to Congressmen, state elections solely for state officials are not within this preemptive clause (the election of a President is governed by Art. II, § 1, as amended by the 12th and 20th Amendments). Where applicable, however, i. e., elections solely for Congressmen or elections for both federal and state officials, Congress has a superintending and a superseding power, and in case of a conflict between their laws, the national ones govern; the federal government thus has the power and the duty "to protect the citizen in the exercise of rights conferred by the Constitution. . . ." ²⁴ This permits state and federal laws to exist "in a harmonious system perfectly capable of being administered and carried out as such." Thus, under the Assimilative Crimes Act, state election officials stuffed ballot boxes, in violation of a Maryland law, and were prosecuted in a federal district court because the federal statute made it a crime to violate a state duty in an election for a federal official.²⁵ This federal power was extended to primary elections

Amendment . . . [which] states but a truism that all is retained which has not been surrendered" See also § 285, n. 2, *infra*.

23. *Coyle v. Smith* (1911) 211 U.S. 559, 31 S.Ct. 688, 55 L.Ed. 853. A limitation upon a state's political powers is thus invalid, as in the *Coyle* case where the removal of the state's capital was upheld despite a limiting condition in the statute of admission. Property limitations are, however, upheld,

e. g., restricting the state's power over federal lands, *Stearns v. Minnesota* (1900) 179 U.S. 223, 21 S.Ct. 73, 45 L.Ed. 162, or exempting from state taxes lands sold by the United States for five years thereafter. *Van Brecklin v. Tennessee* (1886) 117 U.S. 151, 6 S.Ct. 670, 29 L.Ed. 845.

24. *Ex parte Yarbrough* (1884) 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274.

25. *Ex parte Siebold* (1880) 100 U.S. 371, 386, 25 L.Ed. 117.

in a so-called "one-party state," and then to a "two-party state," and this regardless of any devices to withdraw state control and make primaries run by private organizations, with the 15th Amendment's limitations also held applicable.²⁶ The federal government may thus set up its own standard for voting requirements, which the states cannot reject or circumvent, and in this fashion federal offices are released from local domination or influence, although *quaere*, if a state refuses to have any elections for any offices, state or federal, during a year when federal elections are to be held, can the federal government compel a state to activate its election machinery and defray the costs, or must (can?) the federal government hold its own elections?

§ 66. — — Judicially

In Chapter II the federal-state conflict was settled, at least in the judicial field, by virtue of the Supremacy Clause. The power of Supreme Court review of all federal inferior courts was unquestioned, although over federal legislation and executive action it may have been originally arguable and argued; but that such a power should, could and did exist over state action was desired and conceded even in the Convention of 1787. Thus the first Judiciary Act of 1789, in § 25, and followed ever since, provided for Supreme Court review of the final judgments or decrees of the highest courts of the states, and over bitter state opposition the constitutionality of this provision was upheld in 1810.²⁷ A state's constitutional provisions, or statutes, or executive or administrative actions, inconsistent with the federal constitution or the exercise of a federal power, are therefore invalid.²⁸ The federal courts may remove to themselves for trial a state court's prosecution of a federal official (deputy collector) under the state's criminal laws, provided that he was engaged in the discharge of his official duties, for since the federal government "can act only through its officers and agents, and they must act within the States," these latter may otherwise "paralyze the operations of the" national government.²⁹ The federal privilege

26. *Smith v. Allwright* (1944) 321 U. S. 649, 64 S.Ct. 757, 88 L.Ed. 987; *Terry v. Adams* (1953) 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152; *United States v. Classic* (1941) 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368; *Rice v. Elmore* (4th Cir. 1947) 165 F.2d 387, cert. den. (1948) 333 U.S. 875, 68 S.Ct. 905, 92 L.Ed. 1151, followed in *Baskin v. Brown* (4th Cir. 1949) 174 F.2d 391.

27. *Fletcher v. Peck* (1810) 6 Cr. 87, 3 L.Ed. 162; see also *Martin v.*

Hunter's Lessee (1816) 1 Wheat. 304, 4 L.Ed. 97; *Cohens v. Virginia* (1812) 6 Wheat. 264, 5 L.Ed. 257.

28. E. g., *McClellan v. Chapman* (1896) 164 U.S. 347, 17 S.Ct. 85, 41 L.Ed. 461; *Hauenstein v. Lynham* (1880) 100 U.S. 483, 25 L.Ed. 628 (the treaty power).

29. *Tennessee v. Davis* (1880) 100 U. S. 257, 263, 25 L.Ed. 648; see also *Cunningham v. Neagle* (1890) 135 U.S. 1, 10 S.Ct. 658, 34 L.Ed. 55.

against self-incrimination is not available in a tax case where fear of a state law is its basis.³⁰

§ 67. — — — Diversity Jurisdiction

Two sovereigns may co-exist politically and economically without insoluble friction, but in a nation "under law" a dual judicial system is bound to create problems. "In this country, in which in every state we have courts of concurrent jurisdiction under the federal and the state authority, it is of the highest importance that conflict of jurisdiction should be avoided."³¹ Since both judiciaries function in the same geographical area, and deal with the same persons, a seeming "choice" of forum is offered to litigants. However, the Judicial Article defines the judicial power as (here) extending only to "Citizens of different States," so that citizens of the same state are not permitted the choice.³² This federal diversity jurisdiction "was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state. . . ." ³³ What factors enter to determine the choice of a forum? Although the federal courts (theoretically) utilize no English common law in criminal or civil mat-

30. *United States v. Murdock* (1931) 284 U.S. 141, 52 S.Ct. 63, 76 L.Ed. 210, criticized but reapplied in *Feldman v. United States* (1944) 322 U.S. 487, 64 S.Ct. 1082, 88 L. Ed. 1408.

31. Chief Justice Taft in *Harkin v. Brundage* (1928) 276 U.S. 36, 55, 48 S.Ct. 268, 72 L.Ed. 457.

32. Under the applicable federal statutes a "state" includes the District of Columbia and the territories, but the diversity jurisdiction of the federal courts is there also limited by requiring the amount in controversy to be at least \$10,000. 28 U.S.C.A. § 1331. The suit may not be only between citizens of different states but also between citizens of a state and foreign citizens or subjects thereof, and between citizens of different states and in which foreign states or citizens or subjects are additional parties.

"Resident" does not necessarily mean citizenship, *Abercrombie v. Dupuis* (1803) 1 Cr. 343, 2 L.Ed. 129, but "domicile" is a synonymous term. Under 28 U.S.C.A. § 1404(a) the doctrine of *forum non*

conveniens may be utilized in a diversity case. *Vandusen v. J. C. Penney Co.* (W.D.Ark.1962) 207 F. Supp. 529, giving citations. Corporations are considered to be citizens of the state of their incorporation, *Louisville, C. & C. R. Co. v. Letson* (1844) 2 How. 497, 11 L.Ed. 353, although the 1958 amendment, 72 Stat. 415, 28 U.S.C.A. § 1332(c), today provides that for purposes of diversity jurisdiction a corporation shall be deemed to be a citizen of any state by which it has been incorporated "and" of the state where it has its principal place of business. Since the statute is in the conjunctive, such a corporation has, in effect, a multi-state citizenship, which prevents essentially local suits from reaching the federal courts solely because the "local" corporation has a foreign charter. See, e. g., *Nayer v. Sears, Roebuck & Co.* (D.C. N.H.1961) 200 F.Supp. 319. A partnership depends upon the citizenship of all of its individual members, as do unincorporated associations, societies, and companies.

33. *Erie R. R. Co. v. Tompkins* (1938) 304 U.S. 64, 74, 58 S.Ct. 817, 82 L.Ed. 1188.

ters,³⁴ we cannot say that "there is no common law in force generally throughout the United States. . . ." ³⁵ So, under their diversity jurisdiction, the federal courts early contrived their own "general law", in effect telling the states that federal judges were just as competent as local ones to determine and expound the common (general) law. A suitor in Kansas could thus sue a Californian in the Kansas state courts (assuming jurisdiction of the court, and of the defendant by personal or other service) and Kansas law, general or conflict, would apply; but if suit were brought in the federal district court located in Kansas the federal general law would apply and this might or might not follow or reflect local law. Obviously the Kansan's choice would be that forum which gave him all or most of what he desired. Shopping did not stop in Kansas, for suppose either impossibility of service in Kansas or that California courts applied a different or a modified version of the applicable law? A citizen could thus sue a non-citizen in the former's own state courts or the federal district court in that state (assuming jurisdiction obtainable), or go into the other's home state as a non-citizen and sue this other, now citizen, in the state or federal court there located. But this gave the incoming non-citizen suitor a decided advantage, so that the reason for the grant of diversity jurisdiction now became distorted into discrimination against the local citizen. In 1938 the Supreme Court did an about-face, reversed this pernicious doctrine, and held then and in later cases that: in diversity cases the federal courts must apply that state's substantive law; this includes cases in equity as well as at law, and also the state's conflict of laws; the highest state court is authoritative, but intermediate court decisions must not be disregarded in the absence of higher expressions; state changes in its law must be followed by the federal courts.³⁶ The effect of this new approach is to make the federal court "only another court of the State. . . ." ³⁷

§ 68. — — Economically

The economic area has been a fertile source of federal-state conflict since the Supreme Court began to function. In numerous

34. *United States v. Hudson & Goodwin* (1813) 7 Cr. 32, 3 L.Ed. 259, *Smith v. Alabama* (1888) 124 U.S. 465, 8 S.Ct. 564, 31 L.Ed. 308; see also discussion by Mr. Justice Jackson in *D'Oench, Duhme & Co. v. F. D. I. C.* (1924) 315 U.S. 447, 468-469, 62 S.Ct. 657, 86 L.Ed. 956.

35. *Western Union Teleg. Co. v. Call Publishing Co.* (1901) 181 U.S. 92, 101, 21 S.Ct. 561, 45 L.Ed. 765.

36. *Erie R. R. Co. v. Tompkins*, *supra* note 32, reversing *Swift v. Ty-*

son (1842) 16 Pet. 1, 10 L.Ed. 865, *Guaranty Trust Co. of N. Y. v. York* (1945) 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079, *Klaxon Co. v. Stentor Elec. Mfg. Co.* (1941) 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477.

37. *Guaranty Trust Co. of New York v. York*, *supra* note 36, at p. 108, see also *Woods v. Interstate Realty Co.* (1949) 337 U.S. 535, 69 S.Ct. 1235, 93 L.Ed. 1524.

other sections throughout this volume, and especially in Chapter XVIII, the federal powers are seen to be exercised through the judiciary so as to control the economic powers of a state; the federal legislature, of course, likewise so does, as Chapter X illustrates. Under particular constitutional clauses, for example, those illustrated in §§ 74 and 77, below, the federal judiciary again enters an area which appears to be of primary concern to the states, although these clauses grant such a superintending power. Additionally, the judiciary supports the federal (economic) power generally by, for example, overturning a state law which seeks to revoke the license of a foreign corporation to do business within the state if the corporation resorts to a federal court therein; upholding a federal equity receivership over subsequent state action; supporting federal priority for its taxes, revenues, and debts over those of a state.³⁸ However, these references do not imply that all the federal government does is to exercise a negating power over the states, for in § 63, above, references to federal programs and grants-in-aid discloses the contrary.

§ 69. — — — Taxation

One of the most important aspects in the federal-state relation is taxation, for this is the financial life-blood of the nation, the state, and the locality. Chief Justice Marshall early felt that "the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied. . . ." ³⁹ On the national level taxes are also used to combat recessions, and they can further be used to attain social ends. If a sovereign is (1) limited in its power to function, and especially to exist, by having its own tax power impaired, or (2) by having another sovereign's tax power used to affect or control it, then friction of a political nature must result. The judiciary replaces the battlefield and, in effect, arbitrates and accommodates the conflicting federal and state claims, and we examine both of the above methods.

The Supreme Court very early felt that a state could not tax, and thereby affect or control, an instrumentality of the federal government, i. e., notes issued by a branch of the federally incor-

38. *Terral v. Burke Construction Co.* (1922) 257 U.S. 529, 42 S.Ct. 188, 66 L.Ed. 352; *Harkin v. Brundage* (1928) 276 U.S. 36, 48 S.Ct. 268, 72 L.Ed. 457; *Spokane County v. United States* (1929) 279 U.S. 80, 49 S.Ct. 321, 73 L.Ed. 621. By statute, as seen in § 63, above, the federal district courts no longer

can restrain state utility rates and administrative orders, or collection of state taxes, where a sufficient state remedy is available.

39. *McCulloch v. Maryland* (1819) 4 Wheat. 316, 424, 4 L.Ed. 579; see also *Gibbons v. Ogden* (1824) 9 Wheat. 1, 6 L.Ed. 23.

porated Bank of the United States, although Marshall also said that "This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. . . ." ⁴⁰ This doctrine of tax immunity was (unfortunately) given an expanded scope in the definition of instrumentality and extended to include the salary of a federal officer engaged in an essential function, although otherwise he and his family were held subject to state laws; a reciprocal holding then made like state officials also free of federal taxes.⁴¹ In 1933 Chief Justice Hughes, hinting at the future, wrote that "The principle invoked by the petitioner, of the immunity of state instrumentalities from federal taxation, has its inherent limitations. . . . It is a principle implied from the necessity of maintaining our dual system of government. . . . Springing from that necessity it does not extend beyond it. Protecting the functions of government in its proper province, the implication ceases when the boundary of that province is reached. . . ." ⁴² In 1939 the Supreme Court and the Congress, perhaps following the lead of the 1938 message of the President to the legislature, both adopted the new principle that non-discriminatory taxation of the salaries of employees of one of the governments by the other sovereign is not an interference with the operations and functions of the taxed government.⁴³ Congress, however, may protect its governmental functions, exercised through public corporations, when it so desires, although a state cannot escape a federal tax when it engages in enterprises which compete with private business, even though state instrumentalities are used.⁴⁴ In other words, a

40. *McCulloch*, supra note 39, at p. 435.

41. *First Nat. Bank of Louisville v. Kentucky* (1870) 9 Wall. 353, 19 L. Ed. 701; *Collector v. Day* (1870) 11 Wall. 113, 20 L. Ed. 122, overruled, however, by the decision in note 43, infra.

42. [*Board of Trustees of Univ. of Ill. v. United States* (1933) 289 U. S. 48, 59, 53 S. Ct. 609, 77 L. Ed. 1025].

43. *Graves v. People of State of New York ex rel. O'Keefe* (1939) 306 U. S. 466, 59 S. Ct. 595, 83 L. Ed. 927, *Public Salary Act of 1939*, 26 U. S. C. A., Int. Rev. Code, § 22, 22 n., § 116. Following the lead in the *Graves* case, the Court, in *O'Malley v. Woodrough* (1939) 307 U. S. 277, 282, 59 S. Ct. 838, 83 L. Ed. 1289,

reversed *Niles v. Graham* (1925) 268 U. S. 501, 45 S. Ct. 601, 69 L. Ed. 1067, now holding that a "non-discriminatory tax laid generally on net income is not, when applied to the income of a federal judge, a diminution of his salary within the prohibition of Article III, Section 1 of the Constitution" but is, rather, his proportionate share in the costs of the government.

44. *Pitman v. Home Owners' Loan Corp.* (1939) 308 U. S. 21, 60 S. Ct. 15, 84 L. Ed. 11 (state recording tax invalid when applied to federal instrumentality's mortgage); *State of New York v. United States* (1946) 326 U. S. 572, 66 S. Ct. 310, 90 L. Ed. 326 (sale of mineral waters by state held taxable); *Helvering v. Powers* (1934) 293 U. S. 214, 55 S. Ct. 171, 79 L. Ed. 291 (fed-

specific Congressional exemption is upheld against a state effort to tax, although some federal agencies or transactions cannot be so taxed without a Congressional authorization; otherwise, no exemption exists unless expressly so granted.⁴⁵

§ 70. — — Federal and State Agencies

In the previous section it was seen that a state could not, by using its taxing powers, affect the functions of a federal agency (i. e., Bank of United States notes). There are, however, other means by which a state may seek a like result. For example, can a state compel a postal truck driver to be licensed by it while he is transporting mail? The answer involves the question "whether the state can interrupt the acts of the general government itself," and the Supreme Court said no. "Of course," continued Holmes, "an employee of the United States does not secure a general immunity from state law while acting in the course of his employment."⁴⁶ The principle involved is "that the agencies of the Federal government are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government."⁴⁷ The important word is "function" and to the extent that an agency's functions are impaired or negated then to that extent is the federal government's functioning interfered with and the state's actions void. The national government, however, in the exercise of its conceded powers, may still, for example, require a state-owned railroad to comply with the federal Safety Appliance Act, as well as other regulatory statutes, or tax state dealers in intoxicating liquors, or impose customs duties on a state institution's imports.⁴⁸ The point of these fact-situations is that a state's activities, as a political sovereign, are not affected or controlled by the federal government, for a state's governmental functions do not ordinarily and usually include these activities.

eral tax upheld on railroad transportation system operated by state); *Wilmette Park Dist. v. Campbell* (1949) 338 U.S. 411, 70 S. Ct. 195, 94 L.Ed. 205 (tax on municipal activities upheld).

45. E. g., *City of Cleveland v. United States* (1945) 323 U.S. 329, 65 S.Ct. 280, 89 L.Ed. 274 (express statutory exemption); *Standard Oil Co. v. Johnson* (1942) 316 U.S. 481, 62 S.Ct. 1168, 86 L.Ed. 1611 (army post exchange automatically not taxable); *Oklahoma Tax Commission v. Texas Co.* (1949) 336 U.S. 342, 69 S.Ct. 561, 93 L.Ed. 721 (lessees of a federal mineral rights not exempt); *New Jersey Realty Titles Ins. Co. v. Division of Tax*

Appeals (1950) 338 U.S. 665, 70 S. Ct. 413, 94 L.Ed. 439 (forbidding state tax upon interest on federal securities).

46. *Johnson v. Maryland* (1920) 254 U.S. 51, 56, 41 S.Ct. 16, 65 L.Ed. 126.

47. *First Nat. Bank of Louisville v. Kentucky* (1870) 9 Wall. 353, 362, 19 L.Ed. 701.

48. *United States v. California* (1936) 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567; *State of Ohio v. Helvering* (1934) 292 U.S. 360, 54 S.Ct. 725, 78 L.Ed. 1307; *Board of Trustees of University of Illinois v. United States* (1933) 289 U.S. 48, 53 S.Ct. 509, 77 L.Ed. 1025.

§ 71. — — Federal Possessions

The federal government theoretically “owns” the United States, but the Constitution is somewhat sparing in its grant of ownership. Under Art. I, § 8, cl. 17, Congress is given power “To exercise exclusive Legislation in all cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States. . . .” This is, of course, the District of Columbia, and the federal government’s relation to it is similar to that of a state over the state’s own area and peoples. For example, the District of Columbia, as well as the territories, are considered “states” for purposes of interstate commerce, absolute Congressional control over their judicial systems, having the District of Columbia being able to sue and be sued as a municipal corporation, and enabling Congress to exercise a “police power” on behalf of their residents,⁴⁹ but they are not considered as states for purposes of permitting their citizens to sue those of another state on diversity grounds, or having separate legislatures or permitting these citizens to vote, although the Constitutional guarantees of individual rights apply to their residents and citizens.⁵⁰ Congress has power, if it so desires, to provide that “state” in a statute shall include the District of Columbia and also territories.⁵¹

In the same Constitutional provisions quoted above Congress is also given a like power “over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.”⁵² Where a state so consents the federal jurisdiction is plenary and exclusive, while acquisitions *sans* consent gives the federal ownership a proprietary status; in case of the former a state, for example, has no authority to tax unless the grant reserved particular rights.⁵³ Federal ownership and use of

49. E. g., *DeGeofroy v. Riggs* (1890) 133 U.S. 258, 10 S.Ct. 295, 33 L. Ed. 642.

50. *Hepburn v. Ellzey* (1805) 2 Cr. 445, 452, 2 L.Ed. 332; *District of Columbia v. Murphy* (1941) 314 U.S. 441, 62 S.Ct. 303, 86 L.Ed. 329 (except that the 23rd Amendment has recently extended the privilege in national elections to District of Columbia citizens); *Citizens Savings & Loan Ass’n v. Topeka* (1875) 20 Wall. 655, 22 L.Ed. 455.

51. 28 U.S.C.A. § 1332. See also *National Mutual Ins. Co. v. Tidewater Transfer Co.* (1949) 337 U.S. 582, 69 S.Ct. 1173, 93 L.Ed. 1556.

52. The federal government’s power to purchase the Louisiana Territory in 1803, and subsequently Florida and Alaska does not derive from this clause. It may be classified as an inherent power of the national sovereign, e. g., *United States v. Curtiss-Wright Export Corp.* (1930) 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255. The power of eminent domain is also available. *Kohl v. United States* (1875) 91 U.S. 367, 23 L.Ed. 449.

53. *Fort Leavenworth R. R. Co. v. Lowe* (1885) 114 U.S. 525, 5 S.Ct. 995, 29 L.Ed. 264, (reserving right to serve personal process in ceded property); *James v. Dravo Con-*

public lands do not *per se* withdraw these lands from a state's jurisdiction.⁵⁴ "True, for many purposes a state has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use, and to prescribe in what manner others may acquire rights in them. Thus, while the state may punish public offenses, such as murder or larceny, committed on such lands and may tax private property, such as livestock, located thereon, it may not tax the lands themselves, or invest others with any right whatever in them. . . ." ⁵⁵

Besides the two aspects of clause 17 discussed above, Art. IV, § 3, cl. 2 gives Congress "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" We first discuss territories (and insular possessions) of the United States, and then its "other property." The government may acquire territories through treaty, war, cession, or even purchase, and as a consequence of such possession has the plenary power of governing and legislating for it. Is this power limited in any way? A territory which has been made a part of the United States by Congressional action, i. e., expressly or judicially implied, is an incorporated territory and has the federal Constitution extended to it and its inhabitants; an insular possession, or an unincorporated territory's inhabitants therefore cannot claim, for example, the right to a trial by a jury in a criminal offense. Despite this seeming legislative *carte blanche* over insular possessions or unincorporated territories, Congress is still limited by whatever express prohibitions are constitutionally placed upon it, e. g., it cannot pass an *ex post facto* law or a bill of attainder.⁵⁶ Congress may

tracting Co. (1937) 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155, *Collins v. Yosemite Park & Curry Co.* (1938) 304 U.S. 518, 58 S.Ct. 1009, 82 L. Ed. 1502 (liberal construction in favor of state's reservation of taxing power); *Johnson v. Yellow Cab Transit Co.* (1944) 321 U.S. 383, 64 S.Ct. 622, 88 L.Ed. 814 (state cannot control liquor sales on ceding territory).

54. *Surplus Trading Co. v. Cook* (1930) 281 U.S. 647, 50 S.Ct. 455, 74 L.Ed. 1091.

55. *Utah Power & Light Co. v. United States* (1917) 243 U.S. 389, 404, 37 S.Ct. 387, 61 L.Ed. 791, although see *Battle v. United States* (1908) 209 U.S. 36, 28 S.Ct. 422, 52 L.Ed. 670, holding federal jurisdiction exclusive over a murder trial,

where the murder was committed on land purchased from the state on which a post office and courthouse was being constructed and over which the state had ceded jurisdiction.

56. *Dorr v. United States* (1904) 195 U.S. 138, 24 S.Ct. 808, 49 L.Ed. 128. In this case the Philippine Islands were held not incorporated and therefore the constitutional right to a jury trial did not extend to them; by statute, however, Congress later extended certain Constitutional privileges to Philippine inhabitants, even though not incorporating it. 39 Stat. 546 (Laws of 1916). An incorporated territory would have such a right to a jury trial. *Rasmussen v. United States* (1905) 197 U.S. 516, 25 S.Ct. 514, 49 L.Ed. 862.

thus treat these possessions and territories as states, e. g., for purposes of interstate commerce, or not as states, e. g., permitting appeals to the Supreme Court where the validity of a state statute is drawn in question; by statute Congress may provide for fundamental rights, e. g., a bill of rights practically identical with the Constitutional ones, and the judiciary will construe these statutory rights as it does the constitutional ones.⁵⁷

The property disposal power of the federal government extends to any and all property constitutionally acquired by it. This power is not limited by the 9th or 10th Amendments. Congress may lease mineral lands, on a royalty basis, or itself mine through its agents; any property it creates may be sold even though it is not surplus; there is no need for the government's own use of its property, even though the property is so capable of being used; and in order to reach a wider market to dispose of its property, the government may purchase private facilities to transmit it there, e. g., private electric lines to transmit the electric energy created by government operated dams so as to sell this energy elsewhere than at the site.⁵⁸ In effect a sovereign may compete with private enterprise, and the Constitution does not prohibit this, e. g., through its own bank, owning and operating merchant ships, establishing a federal housing corporation, the Panama Railroad, a postal savings system.⁵⁹

§ 72. States Versus States—In General

In our federal system the two types of sovereigns, federal and state, are indestructible and indestructibly joined together. But their respective sovereignties are not all-encompassing, so that *vis-a-vis* other nations each is a limited sovereign, and is not recognized as a sovereign in international law. The fifty states nevertheless each have the power to do within their respective borders whatever they desire, subject only to constitutional limitations. Principles of comity necessitate cooperation, e. g., the Rendition Clause discussed in § 75, *infra*, but it is the compelled cooperation or resolution of differences required by the Constitution

57. See, e. g., *Puerto Rico v. Shell Co.* (1937) 302 U.S. 253, 58 S.Ct. 167, 82 L.Ed. 235.

58. *Ashwander v. T. V. A.* (1936) 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688. The power of disposal is "without limitations," at least insofar as the Submerged Lands Act of 1953 is concerned. *Alabama v. Texas* (1953) 347 U.S. 272, 74 S.Ct. 481, 98 L.Ed. 689.

59. *Puget Sound Power & Light Co. v. Seattle* (1934) 291 U.S. 619, 625, 54 S.Ct. 542, 78 L.Ed. 1025, *McCulloch v. Maryland* (1819) 4 Wheat. 316, 4 L.Ed. 579; *King County v. United States* (9th Cir.1922) 282 F. 950; *New Brunswick v. United States* (1928) 276 U.S. 547, 48 S.Ct. 371, 72 L.Ed. 603; *Wilson v. Shaw* (1907) 204 U.S. 24, 27 S.Ct. 233, 51 L.Ed. 351.

which is here discussed.⁶⁰ The mandated clauses are found throughout the Constitution, and each is discussed separately.

§ 73. — In Particular—Direct Suits

Under Art. III, § 2, clauses 1 and 2, the judicial power extends to cases and controversies between two or more states, and the Supreme Court is given original jurisdiction over these suits. Under the old Articles of Confederation the Congress exercised this judicial function which, in the Constitution, was transferred to the Supreme Court and the scope of the jurisdiction broadened. In addition, the judgment of the Supreme Court is enforceable as such.⁶¹ Only civil matters are comprehended within this jurisdiction, and a suit against a state official as such, e. g., a governor in his official capacity, is a suit against the state; while one state cannot ordinarily sue another for the private benefit of its citizens, yet when their health and prosperity is endangered, or under the *parens patriae* doctrine, jurisdiction will be upheld.⁶² The law usually applied by the Supreme Court, "as the exigencies of the particular [ordinary] case may demand," is federal, state, and international law, but in this type of suit Chief Justice Fuller said that "through these successive disputes and decisions this court is practically building up what may not improperly be called interstate common law" ⁶³ Although states may sue one another, and a state may be sued by the United States, public policy forbids a state from suing the United States without its consent.⁶⁴

60. In *Bank of Augusta v. Earle* (1839) 13 Pet. 519, 589, 10 L.Ed. 274, Chief Justice Taney said, *inter alia*, that "It has, however, been supposed that the rules of comity between foreign nations do not apply to the states of this Union The Court think otherwise. The intimate union of these states, as members of the same great political family; the deep and vital interests which bind them so closely together; should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness towards one another, than we should be authorized to presume between foreign nations"

61. *Rhode Island v. Massachusetts* (1838) 12 Pet. 657, 9 L.Ed. 1233; see also *Virginia v. West Virginia* (1918) 246 U.S. 565, 38 S.Ct. 400, 59 L.Ed. 1272.

62. *Wisconsin v. Pelican Ins. Co.* (1888) 127 U.S. 265, 8 S.Ct. 1370, 32 L.Ed. 239, *Kentucky v. Dennison* (1861) 24 How. 66, 16 L.Ed. 717; *Missouri v. Illinois* (1901) 180 U.S. 208, 21 S.Ct. 331, 45 L.Ed. 497; *Georgia v. Pennsylvania R. R. Co.* (1945) 324 U.S. 439, 69 S.Ct. 716, 89 L.Ed. 1051.

63. *Kansas v. Colorado* (1902) 185 U.S. 125, 146, 22 S.Ct. 552, 46 L.Ed. 838. In *Hinderlider v. La Plata River & Cherry Creek Ditch Co.* (1938) 304 U.S. 92, 110, 58 S.Ct. 803, 82 L.Ed. 1202, a water-apportioning case, the Supreme Court felt it involved a question of "federal common law."

64. *Kansas v. United States* (1907) 204 U.S. 331, 342, 27 S.Ct. 388, 51 L.Ed. 510.

§ 74. — — The Compact Clause

Under Art. I, § 10, cl. 3, "No State shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State" This limitation upon a state's powers is a political one, that is, it seeks to prevent agreements between or among states which tend to increase the political powers of one or more states or which may conversely tend to diminish those of the federal government or encroach upon or interfere with its own powers. In all other aspects the states are free to cooperate.⁶⁵ In *Virginia v. Tennessee* the Court "did not perceive any difference in the meaning" of "compact or agreement," and said that these, "taken by themselves, are sufficiently comprehensive to embrace all forms of stipulations, written or verbal, and relating to all kinds of subjects; to those to which the United States can have no possible objection or have any interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting states, so as to encroach upon or impair the supremacy of the United States, or interfere with their rightful management of particular subjects placed under their entire control."⁶⁶ What matters can the United States have no objection to?

"There are many matters upon which different states may agree that can in no respect concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York, which the latter state might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter state to obtain the consent of congress before it could make a valid agreement with Virginia for the purchase of the land. If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie Canal, it would hardly be deemed essential for that state to obtain the consent of Congress before it could contract with New York for the transportation of the exhibits through that state in that way. If the bordering lines of two states should cross some malarious and disease-producing district, there could be no possible reason, on any conceivable public grounds, to obtain the consent of

65. The original inherent sovereign powers of a state to enter into compacts with other states was not surrendered, but merely made subject to the limitation of Congressional consent. *Poole v. Flee-ger* (1837) 11 Pet. 185, 9 L.Ed. 680; see also *Hinderlider v. La Plata*, supra note 63, at p. 104.

holds that the consent of Congress may be given before or after the compact is entered into, and may be express or implied. For a contrary view on the required difference in meaning to be ascribed to agreement and compact, see *Holmes v. Jennison* (1840) 14 Pet. 540, 570, 571, 572, 10 L.Ed. 579.

66. (1893) 148 U.S. 503, 517, 13 S.Ct. 728, 37 L.Ed. 537. The case also

congress for the bordering states to agree to unite in draining the district, and, thus removing the cause of disease. So, in case of threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened states could not unite in providing means to prevent and repel the invasion of the pestilence without obtaining the consent of congress, which might not be at the time in session" ⁶⁷

If the United States will object to matters involving political power, what illustrations can be given? For example, as in the quoted case, the settlement of a boundary dispute by two states, or a compact to control pollution in the Ohio River System, or building and operating a toll bridge.⁶⁸ The compact is held to be a contract within the meaning of Art. I, § 10, forbidding a state from passing any "Law impairing the obligation of Contracts. . . ." ⁶⁹ Congress, may, of course, refuse to give its assent or impose conditions upon it, "appropriate to the subject and transgressing no constitutional limitation." ⁷⁰

§ 75. — — The Rendition Clause

The Federal Article's Section 2, cl. 2, is the Rendition or Extradition Clause. In full, that Clause states: "A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." Although the Clause uses "Treason, Felony, or other Crime" to define the type of offense for which extradition may be requested, the language is broad enough to include all state crimes

67. *Ibid.*, at p. 518. The illustration in effect divides the activities of the states into commercial and police power ones, i. e., where nothing political is involved in the former, and where necessity is present in the latter.

68. *West Virginia ex rel. Dyer v. Sims* (1951) 341 U.S. 22, 71 S.Ct. 557, 95 L.Ed. 713 (holding the Supreme Court would re-examine a state court's determination that its legislature had no authority to enter into a compact); *Delaware River Joint Toll Br. Com'n v. Colburn* (1940) 310 U.S. 419, 60 S.Ct. 1039, 84 L.Ed. 1287. As for the controlling effect of such agreements upon individual rights, see *Hinderlider v. LaPlata River & Cherry Creek*

Ditch Co. (1938) 304 U.S. 92, 58 S.Ct. 803, 82 L.Ed. 1202.

69. *Green v. Biddle* (1823) 8 Wheat. 1, 92-93, 5 L.Ed. 547, stating that "the terms compact and contract are synonymous . . .," and that "Kentucky therefore, being a party to the compact [with Virginia] which guaranteed to claimants . . . their rights, . . . was incompetent to violate that contract, by passing any law which rendered those rights less valid and secure."

70. *James v. Dravo Contracting Co.* (1937) 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155. For an aspect of the Clause not here considered, see *McHenry County v. Brady* (1917) 37 N.D. 59, 163 N.W. 540.

as well as misdemeanors (but not traffic offenses).⁷¹ By statute Congress has implemented the constitutional language, including territories within its scope,⁷² but the Supreme Court early rejected any mandatory rendering, held that only a moral duty was imposed, and that "there is no power delegated to the General Government, either through the Judicial Department or any other department, to use any coercive means to compel" a Governor to discharge such duty.⁷³ Habeas Corpus, in either a federal or state court as required, tests the unlawfulness of the custody of the rendering state.

Although the Supreme Court has held that a person must have been physically present in the demanding state when the crime was alleged to have been committed, in order to be termed a fugitive from justice,⁷⁴ under the Uniform Criminal Extradition Act the state of Ohio permitted extradition of a person to Pennsylvania because, by furnishing a gun used in a robbery in that state, the defendant had become an "accessory before the fact to [the] robbery."⁷⁵ And a fugitive cannot defend against extradition on the ground that to return him would subject him to cruel and unusual punishment in the demanding state, in violation of the 8th Amendment, for "Considerations fundamental to our federal system requires that the prisoner test the claimed unconstitutionality of his treatment by Alabama in the courts of that State. . . ." ⁷⁶

On the international level there is no such requirement or limitation save that of comity, and the federal government not alone has such an inherent power, but, by treaty and statute, has provided for all this.

§ 76. — — The Full Faith and Credit Clause

The Full Faith and Credit Clause, found in Art. IV, § 1, has been termed "the lawyers' clause" by the late Mr. Justice Jackson.⁷⁷ It deserves far more analysis than we can give it here. One of its functions is to assure that all states (and also the United States courts) will recognize the judicial decrees of the others, provided certain requirements are met, which compulsion is lack-

71. *Taylor v. Taintor* (1873) 16 Wall. 366, 21 L.Ed. 287.

72. See early analysis and requirements in *Roberts v. Reilly* (1885) 116 U.S. 80, 6 S.Ct. 291, 29 L.Ed. 544. See also the O'Neill quotation in § 285 on the Rendition Clause.

73. *Kentucky v. Dennison* (1861) 24 How. 66, 107, 16 L.Ed. 717. In 1934, however, Congress made it unlawful to avoid certain types of prosecution by fleeing into another state. 48 Stat. 782.

74. *Hyatt v. Corkran* (1903) 188 U.S. 691, 23 S.Ct. 456, 47 L.Ed. 657.

75. *English v. Matowitz* (1947) 148 Ohio 39, 72 N.E.2d 898, the prisoner claiming the Act, 9 U.L.A. 173 (1942) was unconstitutional.

76. *Sweeney v. Woodall* (1952) 344 U.S. 86, 73 S.Ct. 139, 97 L.Ed. 114.

77. Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution*, 45 Col.L.Rev. 1, 2 (1945).

ing in international law where comity only is granted. The Clause requires that "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State." Congress is then granted power to prescribe by general laws the "Manner in which" these are to be proved, and the effect thereof. Congress has so legislated, requiring seal, and attestation, and certificate as to proof, and has given such records and judicial proceedings the same effect in the proved state "as they have by law or usage in the courts of the state from which they are taken."⁷⁸ State statutes, acts, and records of territories, as well as of countries subject to our jurisdiction, are embraced within the language of the Clause. However, this does not mean that one state can legislate for another, or that a state's public policy cannot prevent enforcement of a contract based upon another state's rules, or that execution can be issued in one state upon the judgment of another, or that the same priority or privilege or lien of the judging state is to be granted in another state. However, when duly proved, a foreign judgment, i. e., of a sister state, is not merely *prima facie* evidence but is conclusive proof of the rights adjudicated, and the Clause "precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based."⁷⁹ In effect the only practical defense is that a foreign judgment was not obtained by personal service of process upon the defendant (assuming no valid waiver, estoppel, submission by contract, etc.), although lack of jurisdiction of the rendering court may also be shown (if a court of general jurisdiction then jurisdiction of subject-matter is presumed), or that the judgment has been discharged, or, within certain limits, that it was procured by fraud upon the foreign court.⁸⁰ Divorce decrees have had a somewhat tortuous construction placed upon them. Where no *bona fide* domicile is factually created, then no jurisdiction of the *res* attaches, and any divorce decree is not entitled to full faith and credit. The jurisdictional issues are primarily factual, so that no general rule applies to all cases. But where factual jurisdiction of the marital *res* attaches, then jurisdiction to affect the marital status exists though no personal *in personam* jurisdiction, sufficient to award or affect alimony, is had. The doctrine of

78. 28 U.S.C.A. § 687. The Clause is examined intensively in works on conflict of laws, e. g., Stumberg, *Principles of Conflict of Laws* (1951, 2d ed.) p. 111 et seq.

79. *Milliken v. Meyer* (1940) 311 U. S. 457, 462, 61 S.Ct. 339, 85 L.Ed. 278.

80. *Atchison, T. & S. Fe R. R. Co. v. Sowers* (1909) 213 U.S. 55, 29 S. Ct. 397, 53 L.Ed. 695; *Huntington*

v. Attrill (1892) 146 U.S. 657, 13 S. Ct. 224, 36 L.Ed. 1123, *Hartford Acc. & Ind. Co. v. Delta & Pine Land Co.* (1934) 292 U.S. 143, 54 S. Ct. 634, 78 L.Ed. 1178; *Griffin v. McCoach* (1941) 313 U.S. 498, 61 S. Ct. 1023, 85 L.Ed. 1481; *Cooper v. Newell* (1899) 173 U.S. 555, 19 S.Ct. 506, 43 L.Ed. 808; *Pennoyer v. Neff* (1878) 95 U.S. 714, 24 L.Ed. 565; *Thompson v. Whitman* (1874) 18 Wall. 457, 21 L.Ed. 897.

"divisible divorce" thus permits a state having jurisdiction only of the marital *res* to affect it, while another state having *in personam* jurisdiction may control alimony, etc.⁸¹ The Supreme Court is the final interpreter of the Clause, and will decide the effect it is to be given and the limitations to be placed upon it.

§ 77. — — Inspection of Imports and Exports

Under Art. I, § 10, cl. 2, a limitation is placed upon states, namely, that "No State shall without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. . . ." This language gives rise to the Import-Export Clause, which applies only to foreign commerce,⁸² and also to the Inspection Clause, which likewise is so limited. However, apart from this Constitutional Inspection Clause, a state, may, under its police powers, validly inspect articles brought into it from sister states, and charge an inspection fee, and also inspect articles being shipped from it, and likewise so charge. Thus state-to-state and state-from-state shipments, i. e., points of destination and points of origin shipments, are subject to such inspections, with an inspection fee involved, subject however to certain constitutional and judicial limitations, and also to the paramount federal regulatory power over commerce. These Clauses and state powers are discussed in greater detail in § 229, *infra*.

§ 78. Persons Versus States—In General

In Part C, entitled "Rights of Persons," several Chapters and numerous sections deal not alone with these rights against the federal government but also against the states. Thus we discuss here only the ability of a person to sue a state, and the privileges and immunities which state citizens enjoy when they venture into another state. This last Clause has been somewhat apotheosized in language which nevertheless indicates the intention of the Founders, as manifested throughout the Fourth (Federal) Article, "to constitute the citizens of the United States one people" (see § 80, *infra*)

§ 79. — State Suability

Under Art. III, § 2, cl. 1, the judicial power is extended to controversies "between a State and Citizens of another State" In 1793, the Supreme Court held that under this grant

81. *Williams v. State of North Carolina* (1945) 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577, *Estin v. Estin* (1948) 334 U.S. 541, 68 S.Ct. 1213, 92 L.Ed. 1561; see also *Johnson v.*

Muelberger (1951) 340 U.S. 581, 71 S.Ct. 474, 95 L.Ed. 552.

82. *Richfield Oil Corp. v. State Board of Equalization* (1946) 329 U.S. 69, 67 S.Ct. 156, 91 L.Ed. 80.

of jurisdiction, and the Judiciary Act of 1789, Georgia could be sued by a citizen of South Carolina (and also by citizens of a foreign country).⁸³ This decision led to the adoption of the 11th Amendment. That Amendment said very simply that the judicial power is not to be construed to extend to any suit in law or equity "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Taken literally, the Amendment merely removed the quoted language of Art. III. Apparently a loophole was available to one Hans, a citizen of Louisiana, who sued that state for interest due him on one of its bonds held by him, contending he was not prevented from so doing because he did not come within the quoted language. The Supreme Court rejected this approach because of reasons of policy, in effect judicially enacting the Eleventh-and-One-Half Amendment.⁸⁴ Government-owned corporations are instrumentalities of the sovereign and thus likewise are so immune, and a suit against an administrator in his official capacity, acting under a valid statute, is a suit against the government.⁸⁵ In a dissenting opinion Mr. Justice Frankfurter has classified suits against sovereigns into four general heads:

"(1) Cases in which the plaintiff seeks an interest in property which concededly, even under the allegation of the complaint, belongs to the government, or calls for an assertion of what is unquestionably official authority. [Suit not maintainable]

"(2) Cases in which action to the legal detriment of a plaintiff is taken by an official justifying his action under an unconstitutional statute. [Suit maintainable].

"(3) Cases in which a plaintiff suffers a legal detriment through action of an officer who has exceeded his statutory authority. [Suit maintainable].

83. *Chisholm v. Georgia* (1793) 2 Dall. 419, 1 L.Ed. 440. The final words in clause 1 extended the judicial power to controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

Although only the suability of a state is the section's caption, that of the United States is also discussed.

84. *Hans v. Louisiana* (1890) 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 442; *Principality of Monaco v. Mississippi* (1934) 292 U.S. 313, 54 S.Ct. 745, 78 L.Ed. 1282 (a foreign state may not sue one of the United States on its repudiated bonds without its consent), *Smith v. Reeves* (1900) 178 U.S. 436, 20 S.Ct. 919, 44 L.Ed. 1140 (nor may a fed-

erally-chartered corporation), *New Hampshire v. Louisiana* (1883) 108 U.S. 76, 2 S.Ct. 176, 27 L.Ed. 656 (nor a state as agent for its citizens), *South Dakota v. North Carolina* (1904) 192 U.S. 286, 24 S.Ct. 269, 48 L.Ed. 448, (unless the assignment to the state of the rights is absolute and the proceeds remain with the state).

85. *Larson v. Domestic and Foreign Commerce Corp.* (1949) 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628, also holding that while such an officer may not be immune from private suits for his own torts yet, acting officially, he cannot be enjoined as his action is that of the sovereign.

"(4) Cases in which an officer seeks shelter behind statutory authority or some other sovereign command for the commission of a common-law tort. [Suit not maintainable]."⁸⁶

However, if a state commences a suit the defendant may seek review from an unfavorable decree, and a (state) official possesses no immunity when acting *ultra vires* or under an unconstitutional statute.⁸⁷ State municipalities and counties, as well as governmental corporations, are also suable by private persons.⁸⁸ While states themselves may sue, and be sued by, other states and the United States,⁸⁹ the United States is not so suable.⁹⁰ Regardless of such immunity, any sovereign may either waive it or consent to be sued, but any such waiver by an official is unavailing in the absence of a statute, and any such consent is limited to its details,⁹¹ e. g., a state waiver from suit in its courts does not permit a suit in the federal courts.

§ 80. — The Fourth Article's Privileges and Immunities Clause

There are two Privileges and Immunities Clauses (P & I) in the federal Constitution and Amendments, the first being found in Art. IV (discussed previously in § 20, *supra*), and the second in the 14th Amendment, § 1, second sentence, clause 1. The 4th P & I states that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States," while the 14th P & I reads that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" Note the differences in approach and in

86. *Ibid.*, at pp. 709-710. The first three groups are not difficult of comprehension, but the last presents difficulties as the cases may just as readily be thrown into the first general heading if the suit involves specific performance or if the United States would be affected by the judgment.

87. *Cohens v. Virginia* (1821) 6 Wheat. 264, 5 L.Ed. 257; *Osborn v. Bank of United States* (1824) 9 Wheat. 738, 6 L.Ed. 204; *Pennoyner v. McConnaughty* (1891) 140 U. S. 1, 11 S.Ct. 699, 35 L.Ed. 363; *Ex parte Young* (1908) 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714; *United States v. Lee* (1882) 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 71. For set-offs and counterclaims as defenses to suits by sovereigns, see *The Siren v. United States* (1869) 7 Wall. 152, 19 L.Ed. 129.

88. *Lincoln County v. Luning* (1890) 133 U.S. 529, 10 S.Ct. 363, 33 L.Ed.

766; *Hopkins v. Clemson Agricultural College* (1911) 221 U.S. 636, 31 S.Ct. 654, 55 L.Ed. 890.

89. *United States v. North Carolina* (1890) 136 U.S. 211, 10 S.Ct. 920, 34 L.Ed. 336; *United States v. Texas* (1892) 143 U.S. 621, 12 S.Ct. 488, 36 L.Ed. 285.

90. *Kansas v. United States* (1907) 204 U.S. 331, 27 S.Ct. 388, 51 L.Ed. 510.

91. See, e. g., *United States v. N. Y. Rayon Imp. Co.* (1947) 329 U.S. 652, 67 S.Ct. 601, 91 L.Ed. 577; *Loneragan v. United States* (1938) 303 U.S. 33, 58 S.Ct. 430, 82 L.Ed. 630. The Supreme Court has said it looks with "disfavor" upon the doctrine of sovereign immunity, *Federal Housing Administration v. Burr* (1940) 309 U.S. 242, 245, 60 S.Ct. 488, 84 L.Ed. 724; *Great Northern Life Ins. Co. v. Read* (1944) 322 U.S. 47, 64 S.Ct. 873, 88 L.Ed. 1121.

language; the first is an affirmative statement, whereas the second is a negative denial; the first does not speak of any kind of action of a state, whereas the second speaks of laws; the first involves state citizens, whereas the second involves federal citizens; the first entitles the state citizens to something, whereas the second prevents its abridgement; the first speaks of privileges and immunities in the conjunctive, whereas the second speaks of them in the disjunctive; and the first entitles state citizens to these rights "in the several States," whereas the second does not (i. e., the 4th P & I does not itself grant state citizens any privileges and immunities, whereas the 14th in effect does).⁹² In this section we analyze the first Clause, and in Chapter XII discuss the second in detail.

There are four aspects of the Clause which may profitably be discussed, namely, what is its purpose, where is its effect, whom does it cover, and what is its scope?

The purpose of the Clause has been stated by Mr. Justice Field in the following language:

"It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.

"Indeed, without some provision of the kind removing from the citizens of each State the disability of alienage in the other States, and giving them equality of privileges with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists."⁹³

Four years later Mr. Justice Miller held that:

"The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the states. It threw around them in that clause no security for the citizens of the state in which they were claimed or exercised. Nor did it profess to control the power of the state governments over the rights of its own citi-

92. The 4th is also self-executory, i. e., no legislation is required and the judiciary may enforce it whereas the 14th has, in the fifth section of the Amendment, a specific grant of power to Congress "to enforce, by appropriate legislation, the provisions of this article." See, for

background material generally, Chap. XVI, esp. § 359, and also Chap. XVII.

93. *Paul v. Virginia* (1869) 8 Wall. 168, 180, 19 LEd. 357; see also *Ward v. Maryland*, *infra* note 101.

zens. Its sole purpose was to declare to the several States, that whatever these rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States, within your jurisdiction.”⁹⁴

The Clause is effective only in a state other than that in which a person resides and is a citizen of; in other words, if a California citizen drove to New York, he would pass through many states, and in each of them he would be “entitled to all Privileges and Immunities of Citizens in the” state in which he was at the time.⁹⁵ The Clause, however, does not compel California to give its own citizens any privileges or immunities; to the contrary, it even permits that state or any state to withdraw whatever privileges or immunities it may be giving its own citizens, so as thereby to prevent a sojourning citizen of another state to claim these. For example, after the Civil War the freed Negroes traveled to other states, and unless these visited states withdrew their grants of privileges and immunities to their own citizens, they would be compelled to grant these to the visitors. This is one reason why the federal outright grant to federal citizens of federal privileges or immunities was made, so that whether at home or in other states, the freed Negro could claim a federal privilege or immunity.

Those whom the Clause covers include only citizens of a State, so that aliens and unnaturalized persons are not covered and, in the *Dred Scott* case, Negroes were likewise held not within its scope.⁹⁶ Foreign corporations, including a Massachusetts trust, are not considered citizens⁹⁷ under this Clause although, under Art. III, “for the purposes of suing and being sued in the courts of the United States, . . . [it is] to be considered as a citizen of the State, as much as a natural person.”⁹⁸

What are the rights, or privileges or immunities, which are covered by this Clause? The early statement of Mr. Justice Washington, in 1823, has become the classic touchstone:

“We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature,

94. *Slaughter-House Cases* (1873) 16 Wall. 36, 77, 21 L.Ed. 394.

95. “But the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens. . . .” *Ibid.*, at p. 180.

96. *Scott v. Sandford* (1857) 19 How. 393, 15 L.Ed. 691. Of course this case is no longer the law.

97. *Asbury Hospital v. Cass County*, N.D. (1945) 326 U.S. 207, 66 S.Ct. 61, 90 L.Ed. 6; *Hemphill v. Orloff* (1928) 277 U.S. 537, 48 S.Ct. 577, 72 L.Ed. 978.

98. *Barrow S. S. Co. v. Kane* (1898) 170 U.S. 100, 106, 18 S.Ct. 526, 42 L.Ed. 964.

fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads; protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and in exemption from higher taxes or impositions than are paid by the other citizens of the state; . . . to which may be added, the elective franchise, as regulated and established by the laws or Constitution of the state in which it is to be exercised.

. . . ” 99

However, continued the Justice, this did not mean that a state could not prefer its own citizens over visitors from other states insofar as a “common right” was involved, i. e., “They may be considered as tenants in common of this property; and they are so exclusively entitled to the use of it . . .” Thus it was held that a non-resident could not gather oysters from the (state’s) fishing grounds unless on board a vessel wholly owned by a state inhabitant or resident. Other cases: held that wild game was likewise to be so treated, as well as the running water of a state, and granted inhabitants a preference in the use of natural gas in its territory; upheld uniform requirements of residence for a period of time before a newcomer could vote or run for office, or sell insurance; permit service of process upon agents of nonresidents who do business in a state or use its highways; permit a state to limit the dower rights of a nonresident.¹⁰⁰ Within the

99. *Corfield v. Coryell* (C.C.E.D.Pa. 1823) 4 Wash.C.C. 371, 6 Fed.Cas. No. 3,230.

100. *Geer v. Connecticut* (1896) 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793; *Hudson County Water Co. v. McCarter* (1908) 209 U.S. 349, 28 S.Ct. 529, 52 L.Ed. 828; *Pennsylvania v. West Virginia* (1923) 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117; *Blake*

v. McClung (1898) 172 U.S. 239, 256, 19 S.Ct. 165, 43 L.Ed. 432, *LaTourette v. McMaster* (1919) 248 U.S. 465, 39 S.Ct. 160, 63 L.Ed. 362; *Dougherty & Co. v. Goodman* (1935) 294 U.S. 623, 55 S.Ct. 553, 79 L.Ed. 1097; *Hess v. Pawloski* (1927) 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091; *Ferry v. Spokane P. & S. R. Co.* (1922) 258 U.S. 314, 42 S.Ct. 358, 66 L.Ed. 635.

generalities of the quoted definition, however, a citizen: may sue in another's home state upon reasonable conditions, even if not identical with the latter's parallel rights; cannot be substantially discriminated against in taxation, or have a special tax imposed upon him before selling goods, although on the basis of overall fairness a nonresident stockholder may be taxed on the full market value of stock while residents may have the value reduced by the real estate owned by the corporation.¹⁰¹

§ 81. — — Comparison With the Full Faith and Credit Clause

The Full Faith and Credit Clause, together with the Privileges and Immunities Clause, of the 4th Article, in effect "bind" the States beyond merely associating under a common government. Under these Clauses the states must, and legislatively and judicially may be compelled to, recognize not alone the existence of judicially-created rights in sister-states, but also grant to citizens of sister-states the privileges and immunities they give to their own citizens. Thus the citizens and inhabitants of all of the states enjoy a generality of rights and privileges, somewhat common to all, which permits them to conceive of themselves as "one" people, no matter where they may be within the country. However, the two clauses are not identical in their application. This is disclosed by the following:

	Kansas	Maine
Full Faith & Credit	Judgment —	→ Kansas
Privileges and Immunities	Citizen —	→ Maine

In other words, a Kansas judgment taken into Maine enjoys Kansas "law and usage" in Maine, while a Kansaan going into Maine enjoys only Maine's privileges and immunities which it gives to its own citizens. A judgment therefore takes with it its own "law and usage," while a citizen takes no privileges or immunities with him.

101. Chambers v. Balt. & Ohio R. R. Co. (1907) 207 U.S. 142, 28 S.Ct. 34, 52 L.Ed. 143; Canadian N. R. Co. v. Eggen (1920) 252 U.S. 553, 40 S.Ct. 402, 64 L.Ed. 713; Ward

v. Maryland (1871) 12 Wall. 418, 20 L.Ed. 449; Traveler's Ins. Co. v. Connecticut (1902) 185 U.S. 364, 22 S.Ct. 673, 46 L.Ed. 949.

Chapter IV

AMENDING THE CONSTITUTION

§ 85. Introduction

The major vice of the old Articles of Confederation was its rigidity, that is, it required unanimous consent before it could be amended. The new Constitution was a product of adjustment and compromise, so that it was felt doubly necessary to loosen the amending process. However, this power to amend was too great a one to be placed in the hands of less than a totality of the states (or even the people) without in some way placing limitations thereon. The analysis of the amending process therefore falls into a pattern of what is the procedure for amendments (§ 86), what can the amendment do, i. e., its substance (§ 87), what limitations are there upon amendments (§ 88), and, finally, to what extent can the judiciary intervene (§ 89)?

§ 86. Procedure

In § 21, *supra*, the Amending Article was analyzed primarily from the point of view of procedure. It will be recalled that two fractions were involved, namely $\frac{2}{3}$ and $\frac{3}{4}$, that is, it takes $\frac{2}{3}$ to propose an amendment, and $\frac{3}{4}$ to ratify it. There are two separate methods for proposing, and two separate methods for ratifying. Proposals are by either: (1) a $\frac{2}{3}$ vote of both Houses¹ (no Presidential assent is required²); or (2) on the application of $\frac{2}{3}$ of the state legislatures to Congress, it is to call a convention to propose amendments.³ Ratifications are by either: (1) $\frac{3}{4}$ of the state legislatures (the Governor's signature is not required); or (2) by $\frac{3}{4}$ of special state (ratifying) conventions. Whether ratification is by legislature⁴ or convention is left in the hands of Congress,⁵ and only one Amendment to date (the 21st) has specifi-

1. It is $\frac{2}{3}$ of those present, assuming a quorum, not of the entire membership. *National Prohibition Cases* (1920) 253 U.S. 350, 40 S.Ct. 486, 64 L.Ed. 946. See, however, § 89, *infra*, for the analysis there calls into question this entire present discussion and all cases decided before 1939.

2. *Hollingsworth v. Virginia* (1798) 3 Dall. 378, 1 L.Ed. 644.

3. Although Hall, *Constitutional Law* (1911) § 16 expresses doubt

whether Congress could call a convention "upon its own motion," he does not deny that it may be done. That denial is made here.

4. Since the Constitution provides for ratification by the legislature, a state may not provide for a popular referendum. *Hawke v. Smith* (1920) 253 U.S. 221, 40 S.Ct. 495, 64 L.Ed. 871.

5. *United States v. Sprague* (1931) 282 U.S. 617, 51 S.Ct. 220, 75 L.Ed. 640.

cally utilized the convention method.⁶ Furthermore, it is Congress which to now has proposed all the Amendments, although a proposal to limit the federal power to impose taxes is being circulated amongst the state legislatures under the second method.⁷

The state controls its own legislative method of ratification⁸ so that, apparently, a member of the Executive Department, i. e., a Lieutenant Governor, who is also the presiding officer of a state's Senate and can vote in case of a tie, may so vote to ratify.⁹

§ 87. Substance

As contrasted with procedure is substance. We assume that procedurally the amendment has been properly and validly proposed and ratified; now we inquire whether, notwithstanding this procedural validity, the amendment is nevertheless invalid. For example, as § 88, *infra*, discloses, there is a certain limitation of a substantive nature which apparently cannot be amended away (except by unanimous consent), namely, the right of every state to equal suffrage in the Senate. This, however, is a built-in substantive limitation, i. e., it is found in the Amending Article itself, so that an excellent case may perhaps be made against any effort to amend Article V by either the elimination of this limitation, or a change in the number of states which must consent, i. e., ratify. This exception aside, the Supreme Court has apparently opened the entirety of the Constitution to amendment, by alteration, deletion, or addition.¹⁰

6. A proposed (13th) amendment, forbidding any future amendment empowering Congress to interfere with a state's domestic institutions, was proposed in 1861 (12 Stat. 251) but was ratified by only three states, with that of Illinois in 1862 being irregular (void?) because by convention instead of by the legislature as authorized by Congress.

7. The 1962 Amer. Bar Assn's. Mid-year meeting in Chicago has before it a proposal that the Association rescind its 1952 Resolution urging Congress to draft and propose such an amendment.

On September 14, 1962, a proposed (24th) Amendment was forwarded to the fifty states, eliminating poll taxes for federal elections if ratified by three-quarters of the states within seven years.

8. Amendments are effective when the last required State ratifies,

even though by statute the federal Secretary of State is required to issue a proclamation of ratification. *Dillon v. Gloss* (1921) 256 U. S. 368, 41 S.Ct. 510, 65 L.Ed. 994.

9. *Coleman v. Miller* (1939) 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385. Chief Justice Hughes said that whether this was a justiciable or a political question could not be answered because the Court was equally divided. However, see § 89 for a lengthy analysis. A non-legislative method of ratification is disapproved, *supra* note 4.

10. See e. g., the arguments and opinions in the National Prohibitions Cases, *supra* note 1, as well as those in *Leser v. Garnet* (1922) 258 U.S. 130, 42 S.Ct. 217, 66 L.Ed. 505, and *Rhode Island v. Palmer* (1920) 253 U.S. 350, 40 S.Ct. 486, 64 L.Ed. 946. Compare this approach with the limitation by one state's judiciary that amendments must

§ 88. Limitations Upon Amendments—A Possible Addition

The Constitution itself contains various limitations upon amending it, whether of procedure or of substance. In this Chapter we have given many requirements before amendments become effective, and in this sense these requirements are also limitations. The Fifth (Amending) Article sets forth a procedure which, insofar as it must be followed, limits the method(s) whereby the amending power may be exercised. That Article also contains but one built-in limitation upon one substantive aspect of the amending power, i. e., concerning state representation in the Senate,¹¹ but in Art. IV, § 3, cl. 1, another possible limitation is also found. That clause permits new states to be admitted by Congress but continues that "no new State shall be formed or erected within the Jurisdiction of any other States, without the Consent of the Legislatures of the States concerned as well as of the Congress." It would seem as if this clause partakes of the same reasons underlying the incorporation of the built-in Senatorial representation clause. For the purpose of this latter clause is to assure every state of an equal voice somewhere in the federal Congress, so that it be not "lost" or dominated, and in a sense this compromise overcame the objections of the small states to giving up their "one vote" equality with other states as set forth in the Articles of Confederation.¹² Why, therefore, permit a new state to be carved out of another one (the first portion of the quoted clause)? Such a split would result in, for one thing, an increase in the number of Senators in the federal Congress, and thereby dilute the voice (and vote) of every other state; additionally, since the two-formerly-one states would have a community of interest, their Senators would undoubtedly vote together; and, finally, in self-defense, the other states would have to enter this amoeba-splitting race.¹³ The difference in treatment between this limitation and that found in the second portion of the quoted clause is significant. This second portion permits two (small?) states to join forces and become one, but in order to make certain that none of the other states, or the federal government, is thereby overshadowed politically (and economically?) the consent of

not be of a "legislative" nature. State ex rel. Halliburton v. Roach (1910) 230 Mo. 408, 130 S.W. 689.

11. See § 87, *supra*; the other express limitation in the Fifth Article has lapsed by virtue of its own time limitation and the passage of the 16th Amendment.

12. See, e. g., Madison, *The Federalist*, No. 43.

13. The Virginia-West Virginia split is not pertinent for the obvious rea-

sons of war and defense, Randall, *Constitutional Problems Under Lincoln* (1926) 452-452; the cession of land and territories to the Congress under the Articles of Confederation, and the resulting Northwest Ordinance of July 13, 1787, are likewise not pertinent because they did not involve the states as such but their possessions, and also occurred prior to the Constitution.

Congress is required (the consents of the legislatures of the joining states is obviously of no great practical moment here). In Congress the other states can have their voices heard and their votes recorded, so that at least they can express their collective view. It might thus appear that the quoted first portion partakes of the same rationale as does the built-in clause on Senatorial representation, and that these should therefore be treated alike.¹⁴

§ 89. Judicial Review—A Criticism

A strong minority of the Supreme Court, which included now-sitting (1963) Justices Black and Douglas, and then-sitting Justices Frankfurter and Roberts, felt, in 1939, that the question whether ratification by three-quarters of the states (or by the Kansas legislature there involved) had occurred was a "political" one, conclusively placed in the hands of Congress by the Constitution; to this minority view they also added that the submission of an amendment was included in this doctrine; and finally they took one giant step and wrote: "Undivided control of that [amending] process has been given by the [5th] Article exclusively and completely to Congress. The process itself is 'political' in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point."¹⁵ As disclosed

14. The reason for not placing the quoted clause in the Fifth Article is simply understood. For Art. IV, § 3, concerned itself with the admission of new state, something entirely omitted from the old Articles of Confederation, and so there was every good reason to place all methods for the formation of new states into one clause, as was done.

15. *Coleman v. Miller* (1939) 307 U. S. 433, 459, 59 S.Ct. 972, 83 L.Ed. 1385, involving the Child Labor Amendment. This case was argued October 10, 1938. By Jan. 30, 1939, it had not yet been decided. Apparently the division among the Justices was great. On Jan. 20th Felix Frankfurter was commissioned to fill the vacant seat of Cardozo, and he was sworn in on Jan. 30th. On that day the case was restored to the docket of the Court for reargument. On Feb. 13 Mr. Justice Brandeis retired and on April 15th William O. Douglas was commissioned to replace him and was sworn in on April 17th. On that day re-argument was begun and the Court's decision handed

down June 5, 1939. Chief Justice Hughes wrote for the "majority" of himself, Stone, and Reed; Black and Frankfurter concurred in each other's concurring opinions as to the result but not the reasoning of the "majority," with Roberts and Douglas agreeing with them both, so that a "minority" of four agreed with the quoted language; a dissent to the entirety of the opinion was expressed by Justice Butler, and concurred in by McReynolds. The dissenters felt that whether a reasonable time for ratification had elapsed was a justiciable one, and that in this case such a reasonable time had in fact so elapsed (from 1924 to 1937) and that therefore the proposed amendment had lost vitality and could not be ratified by any necessary state. (The 1962 New York Legislature had introduced in both Chambers proposals to ratify the Amendment. S. Int. 530; A Int. 1926. Nothing occurred). The nine Justices divided 5-4 on whether the petitioning state legislators had "standing to sue" (the "majority" of three plus the dissenting two made up this

in the footnote, a total of five Justices agreed that judicial review could be had where petitioners had standing to sue (as there, and were otherwise qualified), and none of these Justices presently sits upon the High Court; a total of seven Justices (including the two presently sitting) nevertheless felt that the political question doctrine included the questions whether a prior rejection by a legislature could be reversed by its subsequent ratification, and whether by virtue of the lapse of time a proposal lost vitality,¹⁶ but the Justices were equally divided on whether a Lieutenant Governor's tie-breaking vote in a state Senate was or was not also a political question. Since the Supreme Court determines this "political question" for itself in each case, upon reasons of judicial (political?) policy, there is no reason to assume that determinations of over two decades ago must necessarily be followed today.¹⁷ It would appear that the broad minority view is the acceptable one, namely, that the entire submission and ratification process is a political one and outside the scope of judicial review. For the Constitution is basically a political, not a judicial, document, and its continuation or rejection (in whole or in part) should partake of the same flavor. Additionally, what of the principle that the people control all, so that assuming state legislative requests for a convention (i. e., the people) proposal, with state convention (i. e., the people) ratifications, should any other body intervene to thwart their expressed will? Of course the objection is that so long as the people follow the amending procedure there is no quarrel with what is accomplished; but suppose they do not so proceed, should they not be

"majority") [see, further *Fairchild v. Hughes* (1922) 258 U.S. 126, 42 S.Ct. 274, 66 L.Ed. 499]; on whether the Lieutenant Governor could participate in the legislative ratification by casting a tie-breaking vote, because it was a political question, the Court divided equally, but there is no indication in the report of which one of the nine abstained; on whether a prior rejection of the proposed amendment could be overcome by a later ratification, and whether by virtue of the lapse of time the proposed amendment had lost its vitality prior to the required ratifications, both the "majority" of three and the concurring "minority" of four were in agreement, namely, that these were political questions, but for different reasons.

16. Twenty years before *Coleman v. Miller* the 18th (Prohibition) Amendment was promulgated (later repealed by the 21st Amendment

promulgated in 1933). That 18th Amendment's third section made the proposal inoperative unless ratification occurred "within seven years from the date of submission hereof to the States by the Congress." Since then all proposals (save for the 19th Amendment, which was then pending and was not promulgated until August 26, 1920) have contained like time limitations. The effect upon the Supreme Court of these illustrations of Congressional ability, in the 18th, 20th, 21st and 22nd Amendments, to prevent the *Coleman v. Miller* situation from again arising, will undoubtedly be to uphold this power and follow the Congressional desires.

17. See also the discussion in § 462 on the 1962 Reapportionment Case and the court's handling of the "political question" there allegedly involved.

told of their procedural error? The short answer is that the procedural errors involved in past cases have arisen because of ambiguities which could have been easily resolved by the Congress, the political body which decides political questions. Further, does not the intent of Article V show, through its omission of the Executive completely from the amending process, that the Judiciary should also be included in this exclusion? Otherwise why not include the President, as well as the Judiciary, by having him sign a Congressional proposal or call for a convention? Notwithstanding the preceding analysis and criticism, and based upon the decisions, it appears that the Supreme Court, as of now, will continue to review the amending process in its procedural aspects, albeit in a modified way because of the "political question" doctrine, and subject also to a possible (probable?) reversal of even this limited power of review.

Part B

POWERS AND LIMITATIONS

Chapter V

INTRODUCTORY ANALYSIS

§ 95. Preliminary

In the world of nature and of man as we know it the physical and the social sciences agree on one thing, that for every action there is a reaction, that for every known elementary particle there must be a corresponding anti-particle, and that for every power there is a limitation. The federal sovereign has been constituted in Part A, and some of its powers and limitations were necessarily there discussed. This Part B analyzes federal and state powers and limitations from several points of view. To illustrate one such point of view we quote, "The Government of the United States was born of the Constitution, and all powers which it enjoys or may exercise must be either derived expressly or by implication from that instrument."¹ But if the Constitution is the source of federal powers then its grants themselves must also be a limitation, e. g., "The Congress may not, 'under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government.'"² In other words, the coin-face of the granted power must be a limitation, for otherwise there would be no restriction upon the grant. This, however, does not encompass other types and methods of limitation, and so this Chapter explores the general avenues and sources of powers, and the general avenues and sources of limitations thereon. The other Chapters will discuss particular powers and limitations.

Apart from the preceding, which refers to situations in times of peace, what of emergencies, and what of war? Chief

1. *Downes v. Bidwell* (1901) 182 U. S. 244, 288, 21 S.Ct. 770, 45 L.Ed. 1088, quoted in *Dorr v. United States* (1904) 195 U.S. 138, 24 S.Ct. 808, 49 L.Ed. 128. The *Dorr* case precedes this quotation with: "It may be regarded as settled that the Constitution of the United States is the only source of power authorizing action by any branch of the Federal Government."

2. *Ashwander v. T. V. A.* (1936) 297 U.S. 288, 326, 56 S.Ct. 466, 80 L. Ed. 688, quoting from *McCulloch v. Maryland* (1819) 4 Wheat. 316, 423, 4 L.Ed. 579. The *Ashwander* opinion then continued: "The Government's argument recognizes this essential limitation."

Justice Hughes, in the 1934 Minnesota Mortgage Moratorium Case, generalized on these questions as follows:

"Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system.

"While emergency does not create power, emergency may furnish the occasion for the exercise of power. 'Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.' . . . The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions. Thus, the war power of the federal government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme co-operative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties. When the provisions of the Constitution, in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented. . . . But, where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details. . . ."

In effect, therefore, we must look at powers and at limitations from the points of view of peace, emergency, and war, for different approaches, interpretations, and constructions are not alone possible but undoubtedly probable. Since one Justice's emergency is another Justice's war, and, regardless of the terminological debate engaged in, one bench may grant what another would deny, or limit what another would allow, our analyses rest upon the quicksand of a personal *weltanschauung* (see also § 120, *infra* on this).

3. *Home Building & Loan Ass'n v. Blaisdell* (1934) 290 U.S. 398, 425-426, 54 S.Ct. 231, 78 L.Ed. 413. Although this involved the "contract

clause" of Art. I, § 10, and therefore the power of a state, the opinion ranged wide; to this extent, therefore, it is dictum.

§ 96. Powers—In General

Courts and authors have suggested various terms to be applied to the different types of powers which they find in the Constitution, or have used others in discussing the divisions and subdivisions of the overall powers of the federal and state governments. For example, in Art. I, § 8 we find a series of powers listed in what some have called “enumerated” or “express” powers, with the eighteenth such power also called the source of the “implied” powers, although improperly so. Brandeis felt that instead of using “express” and “implied” we could well have used “specific” and “general;”⁴ the Tenth Amendment mentions “delegated” and “reserved” powers;⁵ and the Ninth Amendment speaks of the “enumeration” of certain rights (powers) in the people. There are, of course, particular names given to particular powers, e. g., the executive or the judicial power, the treaty power, the war power, the commerce power, but we here group and generalize, and discuss types and classifications of powers. For example, one author has written of the popular classification of federal powers into exclusively national, exclusively state, and concurrent, and has called it a “dangerous” classification. “Few powers are exclusively national . . . ; none are exclusively state . . . [and] concurrent powers are powers belonging to the nation but exercisable by the states as a result of inaction or congressional consent.”⁶ Finally, the federal powers may be analyzed from the point of view of those exercised domestically and externally, i. e., in foreign affairs, for “The two classes of powers are different, both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is

4. *Ruppert v. Caffey* (1920) 251 U. S. 264, 301, 40 S.Ct. 141, 64 L.Ed. 260. See also *Lichter v. United States* (1948) 334 U.S. 742, 755-756, 68 S.Ct. 1294, 92 L.Ed. 1694, where Mr. Justice Burton, referring to Art. I, § 8, cl. 12, wrote: “This places emphasis upon the supporting as well as upon the raising of armies. The power of Congress as to both is inescapably express, not merely implied. . . .”

5. See also *United States v. Cruikshank* (1876) 92 U.S. 543, 23 L.Ed. 588, although the doctrine of reserved powers is not acceptable today.

6. *Dodd, Cases and Materials on Constitutional Law* (5th ed. 1954) 422. There are, however, some

powers which are exclusively national: (1) in the sense that the states cannot enter the field even if Congress or the entire federal government desired and permitted them, e. g., the power to coin money, which is not alone expressly granted to Congress in Art. I, § 8, cl. 5, but is also expressly denied to the states in Art. I, § 10, cl. 1, or the power to declare war, granted to Congress in Art. I, § 8, cl. 11, and by implication denied to the states in Art. I, § 10, cl. 3; (2) in the sense that the subject matter of the power is exclusively national, e. g., naturalization, Art. I, § 8, cl. 4, and see *Chirac v. Lessee of Chirac* (1817) 2 Wheat. 259, 4 L.Ed. 234.

categorically true only in respect of our internal affairs.
 . . .”⁷

§ 97. — In Particular—The Doctrine of Enumerated Powers

The opening words of Art. I, § 1, that “All legislative Powers herein granted shall be vested in a Congress of the United States,” provides the doctrine of enumerated powers (see § 96 for details). For if the legislature’s powers are those “herein granted” then save for these no others may be exercised by it. This was Marshall’s view⁸ and, when cast against his otherwise extremely broad interpretations of the Constitution, appears to be an aberration with narrow and restrictive consequences. This view was not long held in its original form, as the doctrines of implied, resulting and inherent powers were utilized to modify it, and the dichotomy of internal-external affairs was utilized to render it inapplicable externally (see § 101). Furthermore, the federal government in 1887 embarked upon a positive regulation of the economic life of the nation (see Chap. X), and since then its exercised powers have greatly exceeded the coin-face limitations which the enumeration in § 8 apparently placed upon the legislature. In factually going beyond these enumerated boundaries the Congress has been aided by judicial acceptance and promulgation of other doctrines. The legislature’s enumerated powers in § 8 have 17 clauses of specific enumerations, although more than 17 separate powers are set forth, together with a final 18th Necessary and Proper power. The 17 powers include general and particular ones, e. g., “To regulate Commerce,” “To constitute Tribunals inferior to the supreme Court,” but this enumeration does not mean that the federal government is strait-jacketed by them; as mentioned previously, the legislature is only one branch of the federal government, and even these legislative powers are broadened in (either content or) application by the judicial use of other doctrines. Thus both other departments have many many other powers set forth or enumer-

7. *United States v. Curtiss-Wright Export Corp.* (1936) 299 U.S. 304, 315–316, 57 S.Ct. 216, 81 L.Ed. 256. See also the *Legal Tender Cases* (1871) 12 Wall. 457, 532, 20 L.Ed. 287: “The powers conferred upon Congress must be regarded as related to each other, and all means for a common end. Each is but part of a system, a constituent of one whole. No single power is the ultimate end for which the Constitution was adopted. It may, in a very proper sense, be treated as a means for the accomplishment of a subordinated object, but that ob-

ject is itself a means designed for an ulterior purpose. Thus the power to levy and collect taxes, to coin money and regulate its value, to raise and support armies, or to provide for and maintain a navy, are instruments for the paramount object, which was to establish a government, sovereign within its sphere, with capability of self-preservation, thereby forming a union more perfect than that which existed under the old Confederacy.”

8. *McCulloch v. Maryland* (1819) 4 Wheat. 316, 405, 4 L.Ed. 579.

ated, and it is the totality of these (enumerated) powers which form the base upon which the national government acts. In addition, a power found in one department may be used by another, directly or indirectly, as, for example in Art. III, § 2, cl. 1, the judicial power is defined as extending to enumerated persons and matter; one of these latter is "to all Cases of admiralty and maritime Jurisdiction . . . ;" even though Congress has not been expressly granted a power, to be found in its § 8 enumeration, of acting upon this subject-matter, it now obtains(?) it through this Art. III judicial enumeration.

§ 98. — — The Doctrine of Implied Powers

In 1819 Marshall had to decide whether Congress had power to incorporate a federal, or national, bank. The particular fact-situation involved the efforts of Maryland to tax notes issued by a local branch of the United States Bank. The Chief Justice conceded that the "enumerated powers" did not contain one "of establishing a bank or creating a corporation," but felt that if a constitution were "to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, [it] would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which composed those objects be deduced from the nature of the objects themselves."⁹ Two aspects of this quotation immediately present themselves: (1) subdivisions of the great powers, i. e., minor ingredients composing those objects, may be deduced; and (2) the means by which these great powers may be carried into execution are separate from the subdivisions. Superficially, therefore, we should be able to take the generalities of Art. I, § 8 and deduce from them minor substantive aspects of these powers; also, apart from the substantive aspects, the method or procedure effectuating these substantive powers may also be deduced. If we substitute "implied" for "deduced" the doctrine of implied powers is presented.¹⁰

9. *McCulloch v. Maryland*, supra note 8, at p. 407. This decision can be seen germinating in Marshall's earlier one in *United States v. Fisher* (1805) 2 Cr. 396, 2 L.Ed. 304.

10. We thus do not use a dictionary definition of the term implied;

rather, its single meaning in the context of this section is to restrict to deductions from a prior, or previously-deduced, substantive power, and we shortly further restrict it to a procedural deduction or implication.

However, in the very next paragraph of his opinion, Marshall hedged by referring to certain of the enumerated powers and then saying: "It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior." It is therefore not "other" powers which may be implied from the enumerated ones but, rather, it is the judicial interpretation of these general terms which adds its substantive gloss. Practically, however, it becomes difficult to distinguish between an implied inferior power, and one which the Supreme Court interprets as coming within the connotations of the particular power.

The doctrine of implied powers, as used here, must thus be restricted to the means by which the enumerated powers are effectuated. "The power being given, it is the interest of the nation to facilitate its execution." What are the means or methods which may be implied as coming within the "vast" powers of the federal government? Says Marshall, "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." But from where does Marshall derive this principle? The answer is two-fold: first, the Necessary and Proper Clause, found in § 8's last enumerated express power, permits Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof;"¹¹ second, necessity, in that unless Marshall so held, the Constitution he was expounding would shrivel into a constricting set of chains upon the federal government.¹²

11. Note that Congress is granted the express power of making all necessary and proper laws not only to carry into execution its own foregoing powers, i. e., those enumerated in the preceding 17 clauses, but it is granted a like power concerning all other powers found vested anywhere in the Constitution in the federal government or its departments or the officers thereof. In other words, although the Necessary and Proper Clause is found in the legislative article, and is limited to the enactment of laws by Congress, it is not further limited concerning the content of those laws to purely Congressional powers and functions.

12. Marshall really adopted Hamilton's views against those of Madison and Jefferson. See, e. g., the latter's "Opinion against the Constitutionality of a National Bank," his report to President Washington of February 15, 1791. For Hamilton's reply, see note 16, *infra*.

Marshall went to great pains to define the term "necessary," rejecting the strict construction urged upon him that it qualified the government's powers in cl. 18 by making these powers utilizable only when indispensable or indispensably necessary, i. e., "that only which is most direct and simple." See pp. 323-326 for his views. So

Thus the doctrine of implied powers here relates to the method of effectuation, that is, it is analogous to a procedural power, rather than to an extension of the federal government's (enumerated substantive) powers.¹³ In effect this may be said to be a constricting or limiting interpretation, as opposed to the allegedly broader one whereby an implied power itself may be of a purely substantive nature and have no basis in effectuating a prior substantive power.¹⁴ The short answer is that the cases generally adhere to this "means" test, and the long answer would involve an analysis of the nature and type of government the people founded. Generally, practically every granted power carries along with it unexpressed others which are vital to the exercise of the former, and it has even been said that from one implied power there may be implied another.¹⁵

§ 99. — — The Doctrine of Resulting Powers

Hamilton's arguments in support of the United States Bank contained in this statement: "[T]here is another class of powers, which may be properly denominated *resulting* powers. . . ." ¹⁶ These powers are not implied, in the sense discussed in § 98, but are separate and apart from the others. How do we know what they are? The Supreme Court has said that "Any of these [individual] powers may be grouped together and an inference from all may be drawn that the power claimed has been conferred," ¹⁷ but Story's Commentaries give it more accurately, namely, that it is "a result from the whole mass of the powers of the National Government and from the nature of political society, than a consequence or incident of the powers spe-

long as a choice was offered of and amongst means, all of which were legitimate, Marshall was perfectly willing to permit the government to choose and not to be restricted to that which was the best (or indispensable), i. e., so long as the method was convenient, useful, conducive, etc. See also the Legal Tender Cases, *supra* note 2, at p. 533.

13. This does not mean that the Necessary and Proper Clause is not also an express, or enumerated, power. See, e. g., Brandeis' statement in *Ruppert v. Caffey*, *infra* note 14, at p. 300.

14. See, e. g., Brandeis in *Ruppert v. Caffey* (1920) 251 U.S. 264, 300, 40 S.Ct. 141, 64 L.Ed. 260: "The distinction sought to be made between the scope or incidents of an express power and those of an im-

plied power has no basis in reason or authority. . . ."

15. *Ibid.*, at p. 300: "Thus the Constitution confers upon Congress the express power to establish post offices and post roads. From this is implied the power to acquire land for post offices in the several states, and as an incident of this implied power to acquire land, the further power is implied to take it by the right of eminent domain."

16. "On the Constitutionality of a National Bank," Feb. 23, 1791, in *Works* (s vols. 1810) I, 115.

17. *United States v. Gettysburg Elec. Ry. Co.* (1896) 160 U.S. 688, 683, 16 S.Ct. 427, 40 L.Ed. 576 (the powers to tax, to declare war, and to equip the armed forces, permit the government to maintain a monument at Gettysburg).

cially enumerated.”¹⁸ In practical effect, if not in strictly legal terminology we may say that the sum of the parts does add up to a result greater than the whole, e. g., 1 plus 1 plus 1 equals not 3 but $3\frac{1}{2}$. Note, however, that the Supreme Court does not say that a resulting power is a substantive addition, for this might be giving the judiciary a power to add to the total substantive powers of the nation; rather, they write that “the power claimed” to stem from, or be found in, the Constitution is “proved” through this aforesaid grouping and inferring. The effect of the doctrine of resulting powers is to give the Supreme Court another legalistic base upon which to support federal activity when and if so inclined.¹⁹

§ 100. — — The Doctrine of Inherent Powers

The concept of human rights is, very generally stated, that a human being, solely and because of such fact, has certain rights which inhere in his very nature, and which are not granted by or obtained from anybody. By analogy, this is the doctrine of inherent power, forcefully stated by Mr. Justice Bradley’s concurring opinion in the *Legal Tender Cases*, where he first discussed the nature of the federal government and then concluded: “Such being the character of the general government, it seems to be a self-evident proposition that it is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions.”²⁰ And Taney, in 1847, felt that a state’s police powers “are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominion.”²¹ The federal government may thus, for example, exclude and expel undesirable aliens, appoint a federal officer to protect a Supreme Court Justice, make international “agreements,” and obtain new territory by discovery and occupation;²² and in the

18. II, 1256, Story cites Marshall’s opinion in *American Insurance Co. v. Canter* (1828) 1 Pet. 511, 542, 7 L.Ed. 242. For more recent decisions see, e. g., *Hines v. Davidowitz* (1941) 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581, and *United States v. Jones* (1883) 109 U.S. 513, 3 S.Ct. 346, 27 L.Ed. 1015.

19. E. g., *Lichter v. United States*, supra note 4, at p. 755, n. 3, where the Renegotiation Act was upheld with specific references to: the Preamble; Art. I, § 8, cl. 1, 11, 12, 13 and 18, as well as Art. II, § 2, cl. 1. See also the *Legal Tender Cases*, supra note 13, at pp. 533–

534, and *Cushman, The National Police Power under the Commerce Clause of the Constitution*, 3 Minn. L.Rev. 289, 295, fn. 13 (1919).

20. (1871) 12 Wall. 457, 556, 20 L. Ed. 287. The Justice lumped these “inherent and implied” powers together and felt the Necessary and Proper Clause provided a sufficient base for both, if otherwise deemed necessary.

21. *License Cases* (1847) 5 How. 504, 582, 12 L.Ed. 256.

22. *United States v. Laws* (1896) 163 U.S. 258, 16 S.Ct. 998, 41 L.Ed. 151; *Fong Yue Ting v. United States*

field of external relations the United States is not limited to any enumerated or implied powers but has inherent powers of a broad and sweeping nature to conduct its foreign affairs.²³

§ 101. — — The Doctrine of Sovereign Powers

In one sense the preceding section's analysis of inherent powers is applicable here, but in another sense it is not. For example, a state is a "sovereign" and yet it does not have those powers we generally attribute to one. Of course the challenging question may then be put, does the federal government? But this is not a proper question. For in international law, as well as in international fact, the federal government is the only sovereign which represents the United States of America; and in national or local law, as well as in economic and emergency fact, the Supremacy Clause has obscured state lines and removed the impedimenta of individual state sovereignties. A sovereign, however, does not alone have certain inherent rights and powers but, in certain areas and fields, must necessarily possess certain additional powers. These are found in the domestic or internal, as well as the international or external, areas. The domestic area may be covered by what are termed "police powers," and in Chapter XII this is explored in detail. Here we confine ourselves to the international area, and in both the political and commercial fields the Supreme Court has upheld the government's broad powers. With respect to foreign affairs Mr. Justice Sutherland wrote:

"As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely, the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. Rulers come and go; governments end and forms of government change; but sovereignty survives. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union.

. . .

(1893) 149 U.S. 698, 13 S.Ct. 1016, 37 L.Ed. 905; *In re Neagle* (1890) 135 U.S. 1, 10 S.Ct. 658, 34 L.Ed. 55; *Altman & Co. v. United States* (1912) 224 U.S. 583, 32 S.Ct. 593, 58 L.Ed. 894; *Jones v. United*

States (1890) 137 U.S. 202, 11 S.Ct. 80, 34 L.Ed. 691.

23. *United States v. Curtiss-Wright Export Corp.* (1936) 299 U.S. 304, 315-316, 318, 57 S.Ct. 216, 81 L.Ed. 255.

"The Union existed before the Constitution, which was ordained and established among other things to form 'a more perfect Union.' Prior to that event, it is clear that the Union, declared by the Articles of Confederation to be 'perpetual,' was the sole possessor of external sovereignty, and in the Union it remained without change save in so far as the Constitution in express terms qualified its exercise. The Framers' Convention was called and exerted its powers upon the irrefutable postulate that though the states were several their people in respect of foreign affairs were one.

. . .

"It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality. Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens . . .; and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law. As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign. . . ." ²⁴

In the field of foreign, as distinguished from domestic, i. e., interstate and intrastate, commerce, Chief Justice Hughes upheld the national government's extremely broad, plenary and exclusive rights. He felt that "No one can be said to have a vested right to carry on foreign commerce . . .," and therefore the federal government's "exercise [of that power] may not be limited, qualified, or impeded to any extent by state action." For, he concluded, "In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." ²⁵

24. *United States v. Curtiss-Wright Export Corp.*, *supra* note 22, at pp. 316-318. For a criticism of this case, see Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 *Yale L.J.* 467 (1946).

25. *Board of Trustees of Univ. of Illinois v. United States* (1933) 289 U.S. 48, 56-57, 59, 53 S.Ct. 509, 77 L.Ed. 1025.

§ 102. Limitations—In General

The fear of despotism was behind the separation doctrine, which was adopted “to preclude the exercise of arbitrary power.” (§ 9, *supra*). This fear of arbitrary power is thus the source for the many limitations which not alone the Constitution has placed upon persons and actions, but which the Supreme Court has judicially also so imposed, and even upon itself (§§ 53–54). This concept has been expressed and diagrammed in § 24 as follows:

Powers \longleftrightarrow CONSTITUTION \longrightarrow Limitations

The literal effect of this diagram, however, is to suggest that without the Constitution and its clauses we would have no federal powers, or limitations thereon, whereas this is not necessarily so. For a nation must possess inherent (§ 100) and sovereign (§ 101) powers, and a dual system of sovereignty must involve limitations. The basic concept therefore is:

Powers \longleftrightarrow Limitations

In other words, as we wrote in § 95, “for every action there is a reaction, for every power there is a limitation.” The Constitution, as we have seen is really but one source, albeit the major one, for the federal powers, and it likewise is such for the limitations. But just as we found national (and state) powers outside the language of the Constitution, so we find national (and state) limitations. There is one observation which may be ventured, that in general it is only the judiciary which has imposed limitations upon itself, in the exercise of its judicial powers, not found in the Constitution, i. e., its self-imposed ones (§§ 53–54); the other two departments apparently have not felt this general need. The following sections disclose how the Supreme Court has interpreted and conceived, with the immediate needs of the nation being cast against its long-term needs or national purposes.

§ 103. — Particular Illustrations—Express Limitations

It is the general practice to point to Art. I, §§ 9 and 10, as illustrations of express limitations upon the federal and state governments, respectively. Save for the first two clauses of § 9 (cl. 1 is no longer effective because of its built-in time limitation), all other clauses in both sections begin with the negative “No.” What other express limitations can be found in this Article? Section 2, cl. 2 limits Representatives as to age, citizenship, and residence, and § 3, cl. 3, does the same for Senators. Other limitations upon persons who compose the government, and thus indirectly limit the government, appear in this Article,

e. g., the Vice President is President of the Senate, but cannot vote save in a tie, and impeachment extends no further than to removal or disqualification, although also subject to indictment, etc. under the law. The other Articles also contain express limitations, e. g.; Art. II, § 1 limits the Presidency to persons of a certain age, etc.; Art. III, § 3 requires a conviction for treason to have at least two witnesses to the same overt act, except where a confession in open court occurs; Art. IV, § 3 limits the formation or erection of new states to jurisdictions outside the existing ones; Art. V prevents amendments depriving a state of its senatorial representation without its consent; and Art. VI, cl. 2 limits the efficacy of state laws and actions because of the Supremacy Clause. The amendments, especially the 14th are not examined, for they would only illustrate further the above references. However, there is another type of express limitation, although some may say that an implication is necessary to be drawn, and this is illustrated by the allocation of powers between two or more persons. For example, we do not include the separation doctrine in this express limitation, but what, for example, of the power to impeach, and the power to try all impeachments? In Art. I, § 2, cl. 2, the House is given "the sole Power of Impeachment," and in § 3, cl. 6, "The Senate shall have the sole Power to try all Impeachments." And what of revenue bills, for § 7, cl. 1 states that "All Bills for raising Revenue shall originate in the House. . . ." A final illustration is found in the Judiciary Article, for there (Art. III, § 2, cl. 2) the Supreme Court is given original jurisdiction which cannot be altered, so that Congress is limited in its ability to enlarge (or diminish) this jurisdiction (see § 38).

§ 104. — — Implied Limitations

Implied limitations may be of several kinds. For example, the first three Articles impliedly embody the separation doctrine (§ 9, *supra*), because "all" legislative powers are granted to the Congress, thereby leaving none to be distributed to the other two departments. So, too, with the doctrine of federalism (Chap. III), for here the interaction becomes interlimitation. And, as we shall see in Chap. IX, the concept of a government of laws and not of men limits the scope of not alone the President's power but also that of Congress and its agencies. Another type of implied limitation may be gathered from language which gives to one department or body a power which is exclusive, that is, another department or body cannot so act and is thereby so limited, as, for example, Art. I, § 8, cl. 11, granting exclusive power to Congress "To declare War . . .;" this limits the other two departments, and also the states. A fifth illustration is found in Art. I, § 8, cl. 3 where Congress is given power to regulate foreign commerce,

with the Indian Tribes, and "among the several States;" impliedly, therefore, commerce within a state, i. e., intrastate commerce, is retained by the states (see also the 10th Amendment) and the effect is to limit the federal government's powers over commerce (although see Chap. X). Or, to illustrate a variation of this limited type of grant to the federal government, under Art. III, § 2, cl. 1 the judicial power is defined to extend to, for example, cases and controversies; this impliedly limits the judicial power (see § 38). A seventh type of implied limitation is found, for example, in Art. IV, § 2, cl. 1 where privileges and immunities are in effect limited to only state citizens, thereby ousting aliens and non-naturalized persons from the coverage of the Clause (see § 80). The 10th Amendment's very language also illustrates this section, for there must be certain powers, even if but a few, which are retained by the states or the people (else the Amendment is a fraud), and in effect this limits the powers of the federal government. Or the 4th Amendment's prohibitions "against unreasonable searches and seizures" discloses that, by implication, a "reasonable" one is permitted, and this reasonable search is therefore a limitation upon the rights of persons (see Chap. XV). A moot question arises under the Judicial Article where (Art. III, § 2, cl. 2) the Supreme Court is given original jurisdiction and also appellate jurisdiction, but this latter "with such Exceptions, and under such Regulations as the Congress shall make;" this undeniably limits the reviewing power of the Supreme Court, but the question now is, does this clause impliedly grant some minimum appellate jurisdiction to the Supreme Court, so that Congress is limited only to "Exceptions," and therefore a limitation upon a limitation now appears?

§ 105. — — Inherent Limitations

This type of limitation is not often described and is somewhat covered in the preceding analyses. We treat it briefly. For example, the mere Constitutional reference to dual sovereignties discloses one aspect of this type of limitation, for there cannot be one sovereign co-existing beside another without (some) limitations inhering in the very concept expressed. In § 100 we saw that there were inherent federal powers, and these necessarily become a limitation upon state action; the converse is also correct. The pardoning power of the President under Art. II, § 2, cl. 1, carries with it a limitation upon the power of the judiciary to punish for contempt, and simultaneously the abuse of this Presidential power creates an inherent limitation via the impeachment powers of the Congress.²⁶ And although the President has power

26. See, e. g., *Ex parte Grossman* (1925) 267 U.S. 87, 45 S.Ct. 332, 69 L. Ed. 527, quotation in § 112, *infra*.

It may be queried whether, under Art. I, § 3, cl. 6 the Chief Justice must preside at the impeachment

to remove a postmaster of the first class despite a statutory requirement that he obtain the advice and consent of the Senate²⁷ (for the President's power over the executive establishment contains an inherent limitation upon the power of Congress to curtail it), still this does not give him the inherent power likewise to remove a Federal Trade Commission except upon statutory grounds.²⁸ So in legislation creating, and delegating power to, an administrative body, there is an inherent constitutional limitation compelling standards to be adequately set forth.²⁹

trial if, for example in the Grossman case, the President continually pardoned the defendant and the Chief Justice continually held the defendant in contempt; would the Chief Justice be so "biased" as to be disqualified?

27. *Myers v. United States* (1926) 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160.

28. *Rathbun v. United States* (1935) 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611.

29. See, e. g., *United States v. Schechter Poultry Corp.* (1935) 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1560, and *Panama Refining Co. v. Ryan* (1935) 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446, esp. concurring opinion in former, and dissent in latter, both by Cardozo, J. and see also § 175, *infra*.

Chapter VI

THE FEDERAL JUDICIAL POWER

§ 110. The Judicial Power—Introductory

In Chapter II the problems of judicial review, with its methods and procedures, as well as its limitations, were discussed, and the basic judicial power there involved was that of the review of state and federal acts and activities (see, however § 115 on whether this is a judicial power). The judiciary, however, has a congeries of jurisdictions greater than merely that of such a power to review legislation and conduct. This power is derived from the federal Constitution, federal statutes, and also those inherent powers which any judiciary possesses. In general, this judicial power is analogous to that exercised by the courts in the states, albeit differences are found. As Mr. Justice Frankfurter has written, "In endowing this Court with 'judicial Power' the Constitution presupposed an historic content for that phrase and relied on assumption by the judiciary of authority only over issues which are appropriate for disposition by judges. . . . Both by what they said and by what they implied, the framers of the Judiciary Article gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union. Judicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies.' . . ."¹ Thus the judicial power is one of which, as St. Augustine wrote of time, If you ask not what it is, I know; but if you ask, then I know not. The brief analysis of the judicial power which follows is to highlight one or two important concepts; for the rest, the other Chapters in this volume permit the lawyer or student to obtain an "expert feel" of its content.

§ 111. — Definition—In General

The judicial power encompasses adjudication, and its final and complete determination and effectuation. It is "the power of a court to decide and pronounce a judgment and carry it into effect between two persons and parties who bring a case before it for decision."² A distinction must first be made between the judicial power and the jurisdiction of a court, namely, that without jurisdiction there can be no exercise of power. In other words, the two

1. Concurring, in *Coleman v. Miller* (1939) 307 U.S. 433, 460, 59 S.Ct. 972, 83 L.Ed. 1385.

2. *Miller, Constitution* (1891) p. 314, quoted in *Muskrat v. United States* (1911) 219 U.S. 346, 356, 31 S.Ct. 250, 55 L.Ed. 246.

are separate and yet together, for the essence of the concept of jurisdiction is that the judicial power now attaches and can be exercised; the judicial power exists in a court even though no jurisdiction over any person or subject-matter is present, but it is an inactive or passive power.³ Another distinction is between the judicial power and the judicial process. This latter may be compared to a procedure or method for arriving at a judgment or conclusion, thus being analogous to the type of procedure used daily by businessmen, military, and others, whereas the judicial power is something in addition to the process, and gives it a finality and an effectiveness that the process as such lacks.⁴ The power cannot operate in a vacuum but only upon actual litigants in an actual case, although this does not inform us of its substance but only of its requirements and its consequences (see, e. g., § 38, *supra*). It is the courts which possess the judicial power, while it is the judges who exercise it; and the language of Art. III, that the judicial power shall "extend" to what is there set forth, in theory is a limitation of scope but not of definition.⁵ It is recognized, however, that by limiting the jurisdiction to, for example, "Cases" or "Controversies," the practical effect is to reduce not alone the coverage but also the definition of the judicial power—at least for the federal Constitution and the federal judicial system. Thus the definition of the federal judicial power does not include advisory opinions,⁶ although actions for a declaratory judgment are upheld.⁷ So federal district courts may set aside rates as confiscatory but cannot set one as reasonable, "because it is not [a function] within the judicial power conferred upon them by the Constitution."⁸ The judicial power has been held by one state court to comprehend rule-making as an inherent power,⁹ although

3. See, e. g., *Williams v. United States* (1933) 289 U.S. 553, 566, 53 S.Ct. 751, 77 L.Ed. 1372.

4. See discussion and analysis in Forkosch, *A Treatise on Administrative Law* (1956) § 47.

5. *Kansas v. Colorado* (1907) 206 U.S. 46, 82, 27 S.Ct. 655, 51 L.Ed. 956: "By this is granted the entire judicial power of the nation. . . ." The Court felt that the statement in § 2 of Art. III, that the judicial power shall "extend" to the items set forth, "is a definite declaration, —a provision that the judicial power shall extend to—that is, shall include—the several matters particularly mentioned, leaving unrestricted the general grant of the entire judicial power. . . ."

6. *Muskrat v. United States*, *supra* note 2, although some of the state

courts accept advisory opinions, *Opinion of the Justices* (1923) 209 Ala. 593, 96 So. 487, others reject, *Self-Insurer's Ass'n v. State Industrial Commission* (1918) 224 N.Y. 13, 119 N.E. 1027, and some are authorized by the state constitutions, e. g., in Colorado, Florida, Maine, Massachusetts, New Hampshire, Rhode Island, and South Dakota.

7. *Aetna Life Ins. Co. v. Haworth* (1937) 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617.

8. *Central Kentucky Natural Gas Co. v. Railroad Commission of Ky.* (1933) 290 U.S. 264, 271, 54 S.Ct. 154, 78 L.Ed. 307.

9. *Hanna v. Mitchell* (1st Dept. 1922) 202 App.Div. 504, 196 N.Y.S. 43.

such a broad power has been statutorily vested in and exercised by the Supreme Court.¹⁰ The judicial power comprehends the (inherent) contempt power, i. e., punishing for a contempt of the court's authority (see also § 112);¹¹ the power to appoint masters in chancery, referees, etc.;¹² to control the admission and disbarment of attorneys;¹³ and inherent equitable powers over the court's own process so as to prevent abuse and injustice, and to protect the court's jurisdiction and officers and property in their legal custody.¹⁴ "The award of execution is [not] a part and [not] an essential part of every judgment passed by a court exercising judicial power."¹⁵

§ 112. — In Particular—The Contempt Power

The English viewed disobedience of judicial orders as a contempt of the Crown, whether the disobedience was committed in or out of court, and the first Judicial Act of 1789, in § 17, granted the federal courts power "to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same. . . ." ¹⁶ The Act of 1831 limited this power to contempts in the presence of the courts "or so near thereto as to obstruct the administration of justice," to misbehaviour by court officers, and to disobedience by a person of any lawful judicial writ, order, or process.¹⁷ Until 1874 these

10. See, e. g., *Wayman v. Southard* (1825) 10 Wheat. 1, 6 L.Ed. 253; *Sibbach v. Wilson & Co.* (1941) 312 U.S. 1, 61 S.Ct. 422, 85 L.Ed. 479, discussing the Act of June 19, 1934, 48 Stat. 1064, 28 U.S.C.A. § 723b (now § 2072), which granted this rule-making power over the federal District Courts. Cf., however, *U. S. Bank v. Halstead* (1825) 10 Wheat. 51, 61, 6 L.Ed. 264: "Congress might regulate the whole practice of the courts, if it was deemed expedient so to do; but this power is vested in the courts; and it never has occurred to anyone that it was a delegation of legislative power. . . ."

11. See, e. g., *Ex parte Robinson* (1874) 19 Wall. 505, 22 L.Ed. 205; *Michaelson v. United States*, etc. (1924) 266 U.S. 42, 45 S.Ct. 18, 69 L. Ed. 162 (jury trial not constitutionally required in criminal contempt, and a statute granting it does not invade the powers of the Court or violate the Constitution).

12. *Ex parte Peterson* (1920) 253 U. S. 300, 40 S.Ct. 543, 64 L.Ed. 919.

13. *Ex parte Garland* (1867) 4 Wall. 333, 378, 18 L.Ed. 366.

14. *Gumbel v. Pitkin* (1888) 124 U.S. 131, 8 S.Ct. 379, 31 L.Ed. 374.

15. *Gordon v. United States* (1865) 2 Wall. 561, 17 L.Ed. 921, 117 U.S. 697, at p. 702 (posthumous opinion by Taney), in which the contrary doctrine was enunciated (the quotation has been negated by the insertion of "not"), reversed to indicate the text quotation in Nashville, Chattanooga & St. L. R. R. Co. v. Wallace (1933) 288 U.S. 249, 53 S.Ct. 345, 77 L.Ed. 730 (a declaratory judgment proceeding).

16. 1 Stat. 73, 83. The use of summary attachment excluded all other methods of punishment.

17. 4 Stat. 487, now 18 U.S.C.A. § 401. Perjury alone is not sufficient to constitute a contempt, although when in addition to it or any other type of misbehaviour there is added the further element of obstruction to the administration of justice, a contempt exists.

statutes were not judicially challenged, but then Mr. Justice Field, although sustaining the 1831 act, declared: "The power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of judgments, orders and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power" although, since the inferior federal courts were beholden to Congress for power, jurisdiction, etc., that body could control their contempt power but, he felt, not that of the Supreme Court.¹⁸ However, later decisions apparently disagree with such a complete legislative control of the contempt power, e. g., "the attributes which inhere in that [contempt] power . . . are inseparable from it [and] can neither be abrogated nor rendered practically inoperative," and this is especially so concerning "the power to deal summarily with contempts committed in the presence of the courts or so near thereto as to obstruct the administration of justice" ¹⁹ Since it is the administration of justice which is the touchstone of this judicial power, this administration begins the moment the court's powers are invoked. For example, a judge issues a temporary restraining order for the purpose of maintaining the *status quo* until the court's jurisdiction is determined; this question of jurisdiction is a substantial one; regardless of the eventual determination on jurisdiction, and even if the court determination rejects jurisdiction, a disobedience of the restraining order is punishable as and for a contempt. Furthermore, if the court does have jurisdiction over the person and over the subject matter, the order must be obeyed until reversed in regular proceedings even though the statute on which the order is based is declared unconstitutional. Additionally, contempt punishment is upheld although the basic order is in excess of the court's jurisdiction and is set aside on appeal, or even though the underlying action is moot.²⁰

The free speech and press guarantees of the 1st Amendment (and also through the 14th Amendment as a limitation upon the states) do limit this judicial contempt power,²¹ so that newspapers

18. *Ex parte Robinson*, *supra* note 11, at pp. 510-511.

19. *Michaelson v. United States*, *supra* note 16, at pp. 65-66. See also *Toledo Newspaper Co. v. United States* (1918) 247 U.S. 402, 38 S.Ct. 560, 62 L.Ed. 1186, interpreting "in the presence" etc., exceedingly broadly, but reversed in *Nye v. United States* (1941) 313 U.S. 33, 61 S.Ct. 810, 85 L.Ed. 1172 (a statutory construction case) which re-

jected constructive contempt based on the "reasonable tendency" rule enunciated in the *Toledo Newspaper case*.

20. *United States v. United Mine Workers* (1947) 330 U.S. 258, 293-307, 67 S.Ct. 677, 91 L.Ed. 884.

21. *Bridges v. California* (1941) 314 U.S. 252, 260, 62 S.Ct. 190, 86 L.Ed. 192 (a majority dictum), in which the "clear and present danger" test was used.

and other criticism of judicial action already taken, even though the cases were still pending on other points, or while a motion for a new trial was pending, was protected.²² Lawyers, even though officers of the court, at times may exceed the bounds of permissible conduct inside the courtroom and may be summarily punished as and for a contempt,²³ with necessity dictating a departure from procedural due process.²⁴

It is generally held that contempts may be either criminal or civil. Both arise in a civil case or proceeding, but the character and nature of the disobedience create the distinction. In a civil contempt the court's power is used for "remedial" purposes "and for the benefit of the complainant," and the contempt may be purged by complying with the order or fine or both. Since the parties themselves are directly involved, and the court is merely an intermediary, the contempt may be a complete or an incomplete one. In a criminal contempt, however, the completed act is directed at the court, which now is directly involved, and compliance with the underlying order cannot be urged as a basis for purging one's self. "For criminal contempts the sentence is punitive in the public interest to vindicate the authority of the court and to deter other like derelictions." Thus a civil contempt cannot be pardoned by the Executive, although a criminal contempt may, and

"If it be said that the President by successive pardons of constantly recurring contempts in particular litigation, might deprive a court of power to enforce its orders in a recalci-

22. *Pennekamp v. Florida* (1946) 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295; *Craig v. Harney* (1947) 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546.

23. See e. g., *Ex parte Terry* (1888) 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed. 405, and *Cooke v. United States* (1925) 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767 (remanded for further proceedings as the contempt was not in open court).

24. In *Sacher v. United States* (1952) 343 U.S. 1, 72 S.Ct. 451, 96 L.Ed. 717, an outgrowth of the famous trial of eleven Communists, *Dennis v. United States* (1951) 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137, Sacher and others were counsel for the defendants. During the trial numerous clashes occurred between counsel and the District Judge. Immediately after the conviction the Judge issued a certificate under Rule 42(2) of the Federal Rules

of Criminal Procedure, finding counsel guilty of criminal contempt and punishing them. The question was whether the Judge could determine this contempt or, under Rule 42(b), only another judge, after notice and hearing, could so determine. The contempts were upheld (some of the specifications were reversed) and the majority held "that Rule 42 allows the trial judge, upon the occurrence in his presence of a contempt, immediately and summarily to punish it, if, in his opinion, delay will prejudice the trial. We hold, on the other hand, that if he believes the exigencies of the trial require that he defer judgment until its completion he may do so without extinguishing his power. . . ." (At p. 11) The minority felt that a trial before another judge was required, with the right to a jury given to the defendant.

trant neighborhood, it is enough to observe that such a course is so improbable as to furnish but little basis for argument. Exceptional cases like this, if it be imagined at all, would suggest a resort to impeachment rather than to a narrow and strained construction of the general powers of the President.”²⁵

In the 1947 *United Mine Workers* case the Supreme Court held that a party's conduct may be both civil and criminal contempt, that both types may be pursued simultaneously, that the court need not differentiate in its hearing, and that coercive and punitive measures, with fine and punishment, may be imposed in a single proceeding.²⁶

§ 113. — — — In Aid of Administrative Orders and Subpoenas

Federal administrative tribunals (Chap. IX) are granted no power to enforce their orders or subpoenas. Applications to the judiciary are usually necessary for an enforcing order, non-compliance now bringing with it judicial contempt proceedings. The first decision upholding this federal procedure, and the right so to use the judicial power, was handed down in 1894 in aid of an Interstate Commerce Commission order; thereafter this procedure and power were used in aid of the contract provisions of the Walsh-Healey Public Contracts Act, the wage and hour provisions of the Fair Labor Standards Act, a hearing examiner under the Civil Aeronautics Act, and under many other basic administrative statutes.²⁷ Subpoenas to investigate possible violations are upheld, as are subpoenas to be present or produce records at hearings, and also to ascertain in a post-order proceeding, whether the final agency order was being complied with.²⁸ Generally there are statutory provisions requiring compliance with agency subpoenas, with a judicial conviction carrying with it a fine or imprisonment or both.²⁹ The necessity for ultimate judicial sanction goes back to the 1894 *Brimson* case where the Supreme Court felt

25. *Ex parte Grossman* (1925) 267 U. S. 87, 111, 121, 45 S.Ct. 332, 69 L. Ed. 527. See also § 129, *infra*. On the distinction between civil and criminal contempts, see further *Bachman v. Harrington* (1906) 184 N.Y. 458, 461, 77 N.E. 657, and *Hornblower & Weeks v. Sherwood* (1954) 307 N.Y. 204, 120 N.E.2d 790.

26. *United States v. United Mine Workers*, *supra* note 20, at pp. 306-307.

27. *I. C. C. v. Brimson* (1894) 154 U. S. 447, 485 (quotation below), 14 S. Ct. 1125, 38 L.Ed. 1047; *Endicott*

Johnson Corp. v. Perkins (1943) 317 U.S. 501, 63 S.Ct. 339, 87 L.Ed. 424; *Oklahoma Press Pub. Co. v. Walling* (1946) 327 U.S. 186, 66 S. Ct. 494, 90 L.Ed. 614; *C. A. B. v. Hermann* (1957) 353 U.S. 322, 77 S. Ct. 804, 1 L.Ed.2d 852. See also *Shapiro v. United States* (1948) 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed. 1787.

28. *United States v. Morton Salt Co.* (1950) 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401.

29. E. g., *The F. T. C. Act*, 38 Stat. 723 (1914) 15 U.S.C.A. § 50.

that an administrative body “could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment.” Although thirty-three years later the High Court unanimously upheld the power of either body of Congress itself to punish a reculant witness, properly served with a Congressional subpoena to appear before a committee to testify,³⁰ Congress has not since then sought to challenge the Brimson language.

§ 114. — Jurisdiction Under

The judiciary of the United States has itself been examined in several places, e. g., § 31, Chap. II, and in this Chapter, and we have carefully distinguished between the judicial process and the judicial power. This power as such required consideration separate from any discussion of the exercise of the power. In other words, how was the judicial power effectuated? Upon what and upon whom? When? Under what circumstances? Etc. This section answers these questions in a particular manner, so that the extension of the judicial power, and its exercise, are seen against the preceding backdrop of the analysis of the judicial power *per se*.

In § 19, *supra*, the Judiciary Article III was analyzed and we saw the judicial power being vested in one Supreme Court and such inferior (constitutional) courts as Congress would ordain and establish. In § 2, cl. 1 of the Judiciary Article this judicial power was extended to i. e., jurisdiction was given over, all cases or controversies:

1. In Law and equity arising:
 - a) Under this Constitution
 - b) The laws of the United States, and
 - c) Treaties made or to be made
2. Affecting:
 - a) Ambassadors
 - b) Other public ministers and consuls
3. Of admiralty and maritime jurisdiction
4. To which the United States was a party
5. Between two or more States
6. Between citizens of different States
7. Between citizens of the same State, claiming lands under grants of different States (obsolete from disuse)

30. *McGrain v. Daugherty* (1927)
273 U.S. 135, 47 S.Ct. 319, 71 L.Ed.
580.

8. Between a State and citizens of another State³¹
9. Between a State, or its citizens, and foreign states, citizens, or subjects.³¹

This jurisdiction has already been examined in §§ 19, 66, 67, 73, 79, 89 and in this Chapter as well as Chapter II, so that few additional comments need be made. The extension of the judicial power to, and the grant of original jurisdiction to the Supreme Court over suits affecting, ambassadors and other public ministers and consuls, does not prevent Congress from vesting concurrent jurisdiction over the last-named in the inferior courts, or permitting suits against them there, or upholding a suit against consular officials in the state courts in the absence of a Congressional desire to the contrary.³² The admiralty and maritime jurisdiction stems from the High Court of the Admiralty of the English Navy; prior to 1776 vice-admiralty courts were created in the colonies, but thereafter the states established their own admiralty courts. "Admiralty" jurisdiction involves cases primarily of a local nature, e. g., harbors, fishing, while "maritime" jurisdiction refers to the high seas, e. g., piracy. An extremely broad interpretation of this jurisdiction, as compared to that existing in England, was sustained by the Supreme Court, which also upheld admiralty *in personam* as well as *in rem* jurisdiction.³³ In the absence of a Congressional requirement, there is no jury used in this class of cases.³⁴ Within Congressional narrowly-permitted limits, parties may use state courts in this type of case, although the federal maritime law must be applied, while federal district courts sitting in admiralty can enforce liens and liabilities created by a state.³⁵

§ 115. Summary

Although the judicial power has been here examined briefly, it must not be thought of as a minor one. For example, it is the final authority in the construction of the Constitution, subject

31. The 11th Amendment, as construed, forbids these suits against a state (citizens of a state are not involved). See § 79, *supra*.

32. *United States v. Ravara* (1793) 2 Dall. 297, 1 L.Ed. 388; *Bors v. Preston* (1884) 111 U.S. 252, 4 S.Ct. 407, 28 L.Ed. 419; *Ohio ex rel. Popovici v. Agler* (1930) 280 U.S. 379, 50 S.Ct. 154, 74 L.Ed. 489.

33. *New Jersey Steam Nav. Co. v. Merchants' Bank* (1848) 6 How. 344, 12 L.Ed. 465.

34. *LaVengeance* (1796) 3 Dall. 297, 1 L.Ed. 610; *The Samuel* (1816) 1 Wheat. 9, 4 L.Ed. 23.

35. *Chelentis v. Luckenbach S. S. Co.* (1918) 247 U.S. 372, 38 S.Ct. 501, 62 L.Ed. 1171; *Rodd v. Heartt* (1875) 21 Wall. 558, 22 L.Ed. 154; *Just v. Chambers* (1941) 312 U.S. 383, 61 S.Ct. 687, 85 L.Ed. 903. Insofar as state compensation statutes are involved, however, the Supreme Court rejected federal "enforcement" or "adoption" of state laws, although apparently upholding federal legislation in this area. See, e. g., discussion in *Davis v. Department of Labor* (1942) 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246.

only to either its own later change and self-reversal, or to an amendment. Insofar as the construction of federal statutes, or of executive conduct, is judicially cognizable, the federal judiciary's interpretation is likewise final, subject again only to either its own later change and self-reversal, or to a different or amended statute. The power of reviewing federal and state legislation (§§ 30-32, *supra*), as has been seen, is so fraught with the possibilities of error and abuse that limitations are required (§ 36 *et seq.*); however, this power of review is not necessarily a judicial power. If, for example, it had never been asserted by Marshall, would the federal court system still have any judicial power at all? Although used by the judiciary, and therefore a power exercised judicially, such a reviewing power might well have been exercised only by the executive; would it then still have been called a judicial power? This is one reason why some critics have called it a political power, usurped by the judiciary; others, however, as Marshall also viewed it, feel that where a written document must be interpreted then the judiciary is the proper organ so to do and to declare the constitutionality or unconstitutionality of the act or conduct involved (see § 30). The judicial power is thus a weighty power, and in the American system of government is sometimes held to be the greatest of all powers (a thought not accepted here).

Chapter VII

THE FEDERAL EXECUTIVE POWER

§ 120. Presidential Election, Succession, and Impeachment

The election of the President is governed by Art. II, § 1. The first sentence of clause 1 vests the executive power in the President, while the second sentence states that he "shall hold his Office during the Term of four Years" Under the 20th Amendment the term of the outgoing President "shall end at noon on the 20th day of January," whereupon that of the incoming President begins. Under the 22nd Amendment he cannot be elected to the office more than twice, and "no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once." This places a maximum of ten years for any one person to serve as President, including the Grover Cleveland separated-terms analogy, i. e., after serving two consecutive terms a President is succeeded by another and is thereafter elected once again to a third (separated) term. The second clause of § 1 begins, "Each State shall appoint,¹ in such Manner as the Legislature thereof may direct," electors equal in number to their entire representation in the Congress who, under the third clause (replaced in its entirety by the 12th Amendment, which itself is slightly modified in the 20th), are now to meet in their respective states and vote separate-

1. Clause 4 gives Congress power to "determine the Time of chusing the Electors," and the day they are to "give" their votes, the day to be uniform throughout the United States. The difference between "appoint" and "chusing" is immaterial. However, "appoint" is used "as conveying the broadest power of determination," so that "various modes of choosing the electors were pursued" by the legislatures, by the vote of the people in a district, partly by each, etc. *McPherson v. Blacker* (1892) 146 U. S. 1, 27-29, 13 S.Ct. 3, 36 L.Ed. 869. Since it is the state which is apparently given the power to determine how this "appoint" or "chusing" is to occur, it is questionable whether the Congressional statute of September 16, 1942 was constitutional. That act sought, "in time of war," to give the armed forces

the right to vote for Congressmen and Electors regardless of state requirements as to registration and poll taxes. It was abandoned two years later, and a new method substituted. 50 (App.) U.S.C.A. §§ 301, 302, 331, 341, now § 459(i). Although the electors are not federal officers, *United States v. Hartwill* (1868) 6 Wall. 385, 18 L.Ed. 830, they do perform a "federal function," *Hawke v. Smith* (1920) 253 U.S. 221, 40 S.Ct. 495, 64 L.Ed. 871, which therefore gives the national government power to protect the manner in which citizens vote for them, and to protect the choice of the electors from fraud and corruption. *Ex parte Yarbrough* (1884) 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 224; *Burroughs v. United States* (1934) 290 U.S. 534, 54 S.Ct. 287, 78 L.Ed. 484.

ly for a president and a vice-president, "one of whom at least shall not be an inhabitant of the same state with themselves" ²

The succession of the President involves Art. II, § 1, cl. 6, and also the 12th and 20th Amendments. We first assume either the electors or the Senate President or both have not acted, and so a President elect or a Vice-President, or both, have not therefore been chosen. The House of Representatives, by ballot in which each state counts as one vote, "shall choose immediately" a President from the three highest voted for (12th Amendment), but if they fail so to do by January 20, then the Vice-President elect (assuming he has been chosen) "shall act as President until a President shall have qualified" (20th Amendment, § 3). If a Vice-President was not chosen by the electors then the Senate chooses from the two highest voted for (12th Amendment). If, however, any of the persons from whom a President or a Vice-President may be chosen dies before the choice is made, then Congress by law may provide therefor (20th Amendment, § 4, although Congress has not yet acted on this). Assuming now that a President is chosen, but fails to qualify, then again the Vice-President so acts (20th Amendment § 3). If neither the chosen President nor the chosen Vice-President qualifies then Congress, by law, may declare who shall act as President, or the manner in which he shall be selected, whereupon he so acts until a President or Vice-President has qualified (*ibid.*). If before January 20th the President elect dies then the Vice-President elect "shall become President." Note that the Vice-President elect actually "becomes" the President, and does not merely "act" as such. There is no provision for the situation where both the President elect and the Vice-President die before January 20th, but undoubtedly the power of Congress to declare who is to act as a President where neither qualifies will control. The Congress has provided for the succession to the Presidency after the Vice-Presidency, having the Speaker of the House first in line, then the President *pro tempore* of the Senate, and then the Cabinet, beginning with the Secretary of State, to Treasury, etc.³ In other

2. Under clause 5 only a natural born citizen, at least 35 and a resident of the country for at least 14 years, is eligible for the Presidency, and the final sentence of the 12th Amendment makes ineligible for the Vice-Presidency anyone who cannot fulfil these requirements. Does "a natural born citizen" include a child born abroad of American parents? If the definition of "citizens of the United States" in § 1 of the 14th Amendment (see

Chap. XVI, *infra*) is given an exclusive interpretation, the answer is no; if inclusive, then yes.

Clause 7 refers to the salary of the President, and clause 8 sets forth the Oath or Affirmation he is to take before entering the execution of the office.

3. Pub.L. 199, 80th Cong., 1st Sess., July 18, 1947 (P.L. 253, § 202a, struck the Secretaries of War and of Navy from the succession and inserted the Secretary of Defense

words, almost every contingency seems to have been provided for up to the "becoming" or "acting" as President. Assuming now a President, or acting President, in office, what happens if he dies, resigns, is removed, or is unable to act? If there is a Vice-President "the Powers and Duties . . . devolve on" him; if both high officials are so involved, then Congress by law may declare "what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected." (Art. II, § 1, cl. 6) Death and resignation are provided for, but not the "Inability [of the President] to discharge the Powers and duties of the said Office, "for who is to determine the presence of such an "Inability," its extent and effect, its duration and its cessation? The Eisenhower-Nixon situation highlights the constitutional dilemma, including whether the Vice-President "becomes," or "acts" as, the President, for the clause states the power and duties "devolve" on him.⁴

The removal from office of not alone the President but also the "Vice President and all civil Officers of the United States" is provided for in Art. II, § 4, which requires "Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Under Art. I, § 2, cl. 5, the House "shall have the sole Power of Impeachment," and under § 3, cl. 6. "The Senate shall have the sole Power to try all Impeachments," a conviction requiring the concurrence of two-thirds of those present. Obviously the Congress cannot impeach and try all federal civil officers, and so clause 7, which limits the Senate's judgment "to removal from Office and disqualification to hold and enjoy any "federal office, permits such a person to be also subject "to Indictment, Trial, Judgment and Punishment, according to Law."⁵ When the Senate sits as such a trier the Senators are on oath or affirmation; if the President is tried, the Chief Justice presides. The impeachment and conviction for treason (defined and limited in Art. III, § 3, discussed in § 19, *supra*) does not present any grave problem, nor does that for bribery; however, what are "other high Crimes and Misdemeanors"? The few Congressional impeachments and convictions heretofore have highlighted the difficulties in construing these terms, whether to adopt a broad or

instead). Of course the one in line must qualify.

4. The "riddle" of this inability situation is disclosed by the agreement between President Eisenhower and Vice-President Nixon, dated March 3, 1958, establishing a procedure if and when such an inability should arise; on August 10, 1961, an identical agreement was made between President Kennedy and Vice-President Johnson, New

York Times, August 11, 1961. Proposed amendments to the Constitution, background information and citations, are found in a report on "The Problem of Presidential Inability" in *The Record of the Bar Association of New York City*, Vol. 17, #4, April 1962, pp. 185-208.

5. The clause makes this in addition to removal, but the criminal laws provide for a separate offense.

a narrow interpretation. The problem has not been resolved. For example, Madison advocated a broad construction in the *Federalist*, #65, and while the impeachment of Mr. Justice Samuel Chase in 1805 gave it substance, the later acquittal seemingly adopted the narrow view that only offenses indictable at common law were included. The impeachment of President Johnson in 1867 stirred the flames of political construction of the terms, and again the acquittal seemingly adopted the limited construction. Since then, however, two lower federal judges were impeached and convicted for conduct not indictable under any statutes, although unless a broad construction in their cases was upheld they could not be removed because of lifetime tenure during "good behaviour;" there may thus be a connection between the constitutional language and the judicial necessity of the particular case.⁶

§ 121. Presidential Powers and Limitations—In General

The Articles of Confederation had no provision for a President although the Committee of the States, which was to manage affairs during any Congressional recess, could, for a limited period of time, appoint one of their number "to preside." (§ 18, *supra*) It was New York's Constitution of 1777 which provided the immediate source from which specifics, to flesh out Montesquieu's conceptual separation doctrine, could be applied to the newly-created office of the Presidency. The Executive Article II opens, in § 1, with these words: "The executive Power shall be vested in a President" The entirety of § 1 sets forth details concerning qualifications for and duration in office, the method of election, etc., and § 4 discusses his removal. It is in § 2 that, in three clauses, his general powers are set forth, with § 3 giving some additional such powers but also imposing a few specific duties. These two sections thus authorize and empower what is undoubtedly one of the greatest and most powerful offices in the world, and yet likewise give rise to uncertainty and confusion on its scope.

The powers set forth in §§ 2 and 3 of the Executive Article are, of necessity, general; there is no need to analogize to the Legislative or the Judicial Articles, for the slightest or most intensive reading of these Executive sections must so conclude. Thus no "enumeration" or "listing" of Presidential powers is found in the Constitution, in the sense that these, and only these, may be utilized; rather, "The executive power was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions

6. See Corwin, ed., *The Constitution of the United States* (1953) pp. 503-504.

where limitation was needed. . . .”⁷ In the field of foreign affairs, however, not alone does the President have an inherent power (see § 100, *supra*), but constitutional objections to legislative delegations in domestic areas do not now apply (see § 133).

One caveat may be suggested; the peacetime, perhaps even the emergency, powers of the President do not suggest analogies to those exercised by him during war. Unless the emergency goes even beyond the Korean facts, and either involves a greater pressure or a domestic situation, the effect of the Steel Seizure Case of 1952 is to limit the Presidential powers in a non-theatre of war situation (see § 140, *infra*). However, it is felt that executive powers are, as in the Minnesota Mortgage Moratorium Case of 1934,⁸ somewhat expansive, if not in creation then in exercise. Perhaps such a semantical exercise clothes the “predilections” of the Justices with an aura of rationality, but this is immaterial; what is of importance is the result and the fact of power and its exercise.

The limitations upon the President’s powers, when he acts as the President, are solely constitutional, and “even the war power does not remove constitutional limitations safeguarding essential liberties. When the provisions of the Constitution, in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented. . . . But, where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details. . . .”⁹ When the President acts as the delegatee of Congress then, of course, he is subjected to those limitations found in the statute and which are within the Congressional power so to impose (see § 123).

§ 122. — In Particular—As President

The powers set forth in Art. II, §§ 2 and 3, are able to be catalogued as follows:

§ 2, cl. 1

1) Is Commander in Chief of:

- a) The Army and Navy of the United States
- b) The militia of the States
 - i) When called into actual service

7. *Myers v. United States* (1926) 272 U.S. 52, 118, 47 S.Ct. 21, 71 L.Ed. 160.

8. *Home Building & Loan Ass’n v. Blaisdell* (1934) 290 U.S. 398, 426, 54 S.Ct. 231, 78 L.Ed. 413: “While emergency does not create power, emergency may furnish the occasion for the exercise of power. ‘Although an emergency may not call

into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.’ . . .” See also § 95, *esp. fn. 3*, *supra*, for additional comments. Note that this case involves a state’s police powers, and is used only for analogy.

9. *Ibid.*, at p. 426.

- 2) He may require written opinions of heads of executive departments upon any subject relating to their offices
- 3) Has power to grant reprieves and pardons for offences against United States
 - a) Except in cases of impeachment

§ 2, cl. 2

- 4) Has power to make treaties
 - a) By and with advice and consent of Senate
 - b) Provided two-thirds of Senators present concur
- 5) Nominates and appoints with advice and consent of Senate
 - a) Ambassadors, other public ministers and consuls
 - b) Supreme Court Justices
 - c) All other officers of the United States
 - i) Not otherwise provided for in Constitution
 - ii) And established by law
 - iii) Although by law Congress may vest appointment of all or part of such inferior officers in President, in courts, or in departmental heads
- 6) Fill up all vacancies during Senate recess (i. e., recess appointments) by granting commissions which expire at end of next session

§ 3,

- 7) May (a) On extraordinary occasions, convene either or both Houses
 - (b) In case they disagree as to time of adjournment, adjourn them to such time as he thinks proper
- 8) Receive ambassadors and other public ministers
- 9) Commissions to all officers of the United States

There are three duties or obligations imposed:

§ 3,

- 1) From time to time "He shall . . . give to the Congress Information of the State of the Union" and
- 2) Recommend to their Consideration such Measures as he shall judge necessary and expedient"
- 3) He "shall take Care that the Laws be faithfully executed"

The preceding are, with one exception, all of the powers which the Constitution grants to the President. That exception is found in Art. I, § 7, cl. 2, which requires that all bills passed by Congress be approved by the President before becoming law, i. e.,

the President has the power of the veto.¹⁰ Contrast this apparent fear of too strong an executive with the powers granted to Congress. For Congressional power is found granted in every Article of the Constitution save for the Supremacy and Ratification ones, and Art. I is the longest in the document. Nevertheless, the President's powers are not to be limited to the enumeration set forth above for, as the earlier § 120 has shown, he has inherent and foreign affairs powers which, with his other (e. g., war) powers, makes him the dominant figure in the United States. Some of the particular powers of the President are examined below.

§ 123. — — As A Congressional Delegatee

The President is able to delegate powers, i. e., act as a delegator, as § 135 *infra* discloses, but here we speak of the President as a delegatee, that is, as one who receives power(s) he does not possess. This may sound a bit strange, that the President may so act as the agent of Congress, but the Constitution itself specifically recognizes not alone that he is to "take Care that the Laws be faithfully executed," but also that "Congress may by Law vest the Appointment of such inferior Officers . . . in the President alone" or in others. Congress has entrusted the President with numerous delegations, for example, making it unlawful to sell arms abroad "if the President finds that the prohibition . . . may contribute to the reestablishing of peace" and so proclaims; giving him power to change duties on imports; authorizing him to approve detailed codes governing businesses subject to federal authority; and empowering him to prohibit the interstate shipment of "hot oil."¹¹ When the President becomes a Congressional delegatee it is obviously plain that he cannot perform all these functions in person, much less in conjunction with his other constitutional powers, and Congress has recognized this in numerous statutes authorizing a subdelegation.¹² Even when the Supreme Court held that a statute required personal Presidential approval, it thereafter sought to circumvent

10. Of course this does not apply to proposals to amend the Constitution, and also has no application to concurrent resolutions; furthermore, a two-thirds vote of both Houses is sufficient to have a vetoed bill become law.

11. *United States v. Curtiss-Wright Export Corp.* (1936) 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255; *Field v. Clark* (1892) 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294; *Schechter Poultry Corp. v. United States* (1935) 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1520 (both latter statutes held unconstitutional because of lack of

effective standards); *Panama Refining Co. v. Ryan* (1935) 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (statute held unconstitutional because of lack of adequate standards).

12. See, e. g., *United States v. Chemical Foundation* (1926) 272 U.S. 1, 13, 47 S.Ct. 1, 71 L.Ed. 131; *Wilcox v. Jackson* (1839) 13 Pet. 498, 10 L.Ed. 264; Grundstein, *Presidential Subdelegation of Administrative Authority in Wartime*, 16 *Geo.Wash.L.Rev.* 301, 478 (1948); and esp. P.L. 673, 81st Cong., 2d Sess., § 4(d), 64 Stat. 436.

this rigid formula by presumptions and statutory interpretations.¹³

The office of the President, and its powers and its limitations, is too vast to be compressed into this one Chapter. Insofar as we discuss the President's own powers (§ 122), those as a delegatee (this § 123), and the two in combination, we may use the language of Mr. Justice Jackson, concurring in the Steel Seizure Case of 1952,¹⁴ to disclose the problems involved:

"The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. We may well begin by a somewhat oversimplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.

"1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. . . .

"2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives

13. *Runkle v. United States* (1887) 122 U.S. 543, 7 S.Ct. 1141, 30 L.Ed. 1167 (holding a judicial power was involved, and distinguishing other cases where the executive power could be subdelegated; *United States v. Page* (1891) 137 U.S. 673, 11 S.Ct. 219, 34 L.Ed. 838 (pre-

sumption); *United States ex rel. French v. Weeks* (1922) 259 U.S. 326, 42 S.Ct. 505, 66 L.Ed. 965 (interpretation).

14. *Youngstown Sheet & Tube Co. v. Sawyer* (1952) 343 U.S. 579, 635-638, 72 S.Ct. 863, 96 L.Ed. 1153.

of events and contemporary imponderables rather than on abstract theories of law.

“3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling Congress from acting upon the subject. . . .”

§ 124. The Executive Departments—In General

In Art. II we find § 1 stating that the President “shall hold his Office” for four years, and § 2 cl. 1 stating that he can obtain written opinions from the heads of “each of the executive Departments,” and cl. 2 giving Congress power, by law, to vest the appointment of inferior officers in the President, the judiciary, “or in the Heads of Departments.” The Constitution thus specifically recognizes that in the Executive branch of the government there will be many Departments, and in § 2, cl. 2 grants the President power to appoint all “Officers of the United States . . . which shall be established by Law . . .” This power is limited, however, by the language immediately preceding it, that the Senate’s consent is required. Excluding the President (and Vice-President), therefore, we can say that the Executive Department consists of: (1) those officials, appointed by the President, who require Senatorial confirmation; (2) inferior officers whose appointment may be vested by Congress in one of the three quoted above; and (3) all others, i. e., employees.¹⁵ In 1950 and 1951 Congress authorized the Chief Executive to delegate to these departmental heads, or any executive agency, or any official appointed with Senatorial consent, any Presidential function or act required to be performed only with his approval or ratification.¹⁶ The following three sections develop somewhat the President’s appointing and removal powers within the executive establishment as well as the limitations thereon.

15. By employee is included all subordinate federal officials who are appointed by those not specifically recognized by the Constitution as capable of being Congressionally vested with the appointing power. *United States v. Germaine* (1879) 99 U.S. 508, 25 L.Ed. 482; *Auffmordt v. Hedden* (1890) 137 U.S. 310, 11 S.Ct. 103, 34 L.Ed. 674; by

inferior officer is meant one subordinate to the appointing officer, although this is not an absolute. *Ex parte Siebold* (1880) 100 U.S. 371, 397, 25 L.Ed. 117.

16. 64 Stat. 419, 65 Stat. 712, 3 U.S.C.A. § 301 et seq. A statute may, however, affirmatively prohibit the delegation or name the delegatee.

§ 125. — In Particular—Appointments and Removals

The origins of the Cabinet are found in England, and in the Convention of 1785 there was a strong desire to impose such a council upon the President, with some delegates suggesting it be composed of members of the Congress, and others feeling that it should include the Chief Justice. The language quoted in § 124, *supra*, is the compromise which was adopted. Congress, by law, has established ten departments in the Executive Establishment, namely, the Departments of State, Treasury, Defense, Justice, Post Office, Interior, Agriculture, Commerce, Labor, and Health, Education and Welfare. Each is headed by a Secretary, appointed by the President with Senatorial consent. The meetings of the Cabinet with the President are solely at his pleasure, for he dominates the officials completely. There is no Cabinet responsibility, as it is the President alone who decides, and the legal relationship between them is entirely one-sided. It is said that Lincoln placed his Emancipation Proclamation before his Cabinet, and requested their opinion as to its issuance, after which the President announced the vote as, "Seven against, one for; the ayes have it." The theory behind this approach is that it is the President who acts "through the heads of the several departments in relation to subjects which appertain to their respective duties."¹⁷ This plenary power over his appointees extends to the President's summary power of dismissal, although a distinction must be made between "all purely executive officers" and those who occupy "no place in the executive department and who [exercise] no part of the executive power vested by the Constitution in the President."¹⁸ The latter are treated in § 132, and the former here. In discussing these executive officers Mr. Justice Sutherland wrote:

"A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the Myers Case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive whose subordinate and aid he is. . . . [T]he necessary reach of the decision goes far enough to include all purely executive officers. It goes no farther; much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President."

17. *Wilcox v. Jackson, etc.* (1939) 13 Pet. 498, 512, 10 L.Ed. 264.

at pp. 627-628, 55 S.Ct. 869, 79 L. Ed. 1611. For the Myers case, see note 19, *infra*.

18. *Rathbun v. United States* (1935) 295 U.S. 602, 628, quotation below

In other words, as to the heads of the executive departments and the principal administrative officers, the power of removal in the President is absolute, and no Congressional limitations may be imposed. But what of inferior officers in the executive establishment? Assuming Congress acts under Art. II, § 2, cl. 2, and vests the appointment of these inferior officers "in the Heads of Departments," may it, in the same law, impose limitations upon their removal? To permit this limitation upon the President would be "an attempt to re-distribute the powers [of government] and minimize those of the President," for just "as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible."¹⁹

§ 126. — — Other Types of Appointments and Removals

The President has been given power in Art. II, § 2, cl. 2 to appoint ambassadors, public ministers, judges, and numerous other officers, e. g., in § 3 that he "shall Commission all the Officers of the United States;" in addition, and by statute, he is Congressionally given power to appoint other types of officers, e. g., to the independent regulatory agencies. As to the former, Senatorial confirmation is required by the Constitution; as to the latter, the statute's requirements control. Under § 2, cl. 3, he also has power "to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."²⁰ Since the President's power is to "Commission" all federal officers, this cannot be exercised by any one else; however, the sealing and delivering up of the commission is a ministerial act which may be Congressionally lodged in another, e. g., the Secretary of State, who may, by

19. *Myers v. United States* (1926) 272 U.S. 52, 117, 47 S.Ct. 21, 71 L. Ed. 160, speaking of a Postmaster, but the principle is here applicable to inferiors.

20. *In United States v. Alocco* (S. D.N.Y.1961) 200 F.Supp. 868, 870, the prisoner contended that the trial judge was not properly commissioned in that the vacancy occurred on July 31, 1955; that the Senate adjourned on August 2d; that on August 17th an interim commission had been issued, and the oath administered on September 15; that the Senate reconvened on January 3, 1956, and then followed nomination, confirmation, permanent commission, and the oath. Thus, ran the argument, since the Senate was in session on

July 31st the President by waiting until the Senate adjourned had no right to make a recess appointment but was compelled to nominate at once; in effect the prisoner contended that the constitutional words "may happen" should mean "may happen to occur" while the Senate is in recess. The court rejected this as unsound because "offices necessary to the complete operation of the government should always be filled." In other words, "may happen" means "may happen to exist," not "may happen to take place," so that if an office becomes vacant during a Senate session and remains unfilled until after adjournment, it "happens to exist" then and can constitutionally be so filled by the President.

mandamus, be compelled to so act unless otherwise prevented.²¹ Of course if the President refuses to deliver up an approved nomination or a commission he already has signed, the appointee is bereft of remedy. Insofar as any "office" is involved, the idea connotes a "public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument and duties."²² Since a "special," or "personal," or "secret" appointee or agent does not fill such an office, confirmation by the Senate is unnecessary; thus also does an "ambassador at large," or a "minister plenipotentiary," or a special "commission" not come within the limitations of Art. I, § 6, cl. 2, that no member of Congress can be appointed to a civil office, or that any person holding any office shall be a Congressman. The power to remove any such personal agent, or executive official, is completely within the President's discretion; as to others, there may be a question of Congressional intent.

§ 127. — — Limitations

The limitations upon the President are to be found in the Constitution; to some extent a statute may impose additional ones. The President is limited as to his appointments (save for inferior officers) insofar as Senate confirmation is required, but this cannot be a conditional one, i. e., granted if the President agrees to one or more conditions. Prior to any nomination the Senate may suggest, but upon nomination it can only accept or reject. Once consent is given and the nominee has taken the oath and office, the power of the Senate is at an end, and they cannot reconsider their action.²³ Insofar as the Congress may, through its power over the purse, seek to restrict Executive heads or inferior officials or employees in the performance of their functions, or in the power of removal, a clear distinction must be kept between the first-named and the others. As to the heads of departments, there is no statutory limitation constitutionally possible;²⁴ as to the inferior officers and employees, however, Con-

21. See, e. g., *Marbury v. Madison* (1803) 1 Cr. 137, 157-158, 182, 2 L. Ed. 60, in which Marshall felt this to be a proper procedure, other considerations not being involved. Or, if so judicially upheld, a mandatory injunction may be sought.

22. *United States v. Hartwell* (1868) 6 Wall. 385, 393, 18 L.Ed. 830.

23. *United States v. Smith* (1932) 286 U.S. 6, 52 S.Ct. 475, 76 L.Ed. 954.

24. In general, see *United States v. Lovett* (1946) 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1252, in which the

President signed the bill of attainder "to avoid delaying our conduct of the war," but placed on the record his view that the particular provision objected to by him was unconstitutional; *State ex rel. Tolerton v. Gordon* (1911) 236 Mo. 142, 139 S.W. 403. And see further the Act of March 1, 1855, 10 Stat. 619, 623, by which the President was authorized to appoint "envoys extraordinary and ministers plenipotentiary," with Senate confirmation and limiting these appointees to citizens, etc., concerning which the Attorney General

gress may, if it desires, enact restrictions. As Brandeis wrote: "A multitude of laws have been enacted which limit the President's power to make nominations, and which through the restrictions imposed, may prevent the selection of the person deemed by him to be best fitted. Such restriction upon the power to nominate has been exercised by Congress continuously since the foundation of the Government."²⁵ The most important of Congressional limitations is based upon its desire not alone to curb the spoils system, but also to install a permanent career civil service for the continuing good of the nation. Thus, for example, a statute in 1876 prohibited all inferior officers and employees from collecting or giving money for political purposes, was sustained by the Supreme Court six years later, and then incorporated the following year in the Civil Service Act of 1883. The 1940 Hatch Act went further and now prohibits politicking, although not the expressing of opinions.²⁶ The civil service procedures of examinations, appointments, etc., need not be detailed here, as they are generally known and there is no present question of their overall constitutionality. However, insofar as the President's power to remove was sought to be limited, the early methods were not too well received. Of the 1867 Tenure of Office Act, repealed in 1887, the Supreme Court said: "It exhibited in a clear degree the paralysis to which a partizan Senate and Congress could subject the executive arm and destroy the principle of executive responsibility, and the separation of the powers sought for by the framers of our Government, if the President had no power of removal save by consent of the Senate. It was an attempt to re-distribute the powers and minimize those of the President."²⁷ The heads of departments are thus almost completely under the power and domination of the President, only the Senate's confirmation being any limitation: as to inferior officers and employees, today all covered by the civil service laws, they are, for practical purposes, without the ambit of such Presidential power.

§ 128. — Privacy and Secret Documents

The Executive establishment cannot function in the spotlight of publicity; the best interests of the nation require that a degree of privacy and immunity insure not alone the President's actions and communications, but also those of his departmental heads

ruled that except for the salary provisions, the rest of the Act was recommendatory only. 7 Op.Atty. Gen. 220.

25. *Myers v. United States* (1926) 276 U.S. 52, 265 (dissenting), 47 S. Ct. 21, 71 L.Ed. 160.

26. 19 Stat. 143, 169 (1876) upheld in *Ex parte Curtis* (1882) 106 U.S.

371, 372-373, 1 S.Ct. 381, 27 L.Ed. 232; 54 Stat. 767, 771 (1940), upheld in *United Public Workers v. Mitchell* (1947) 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754.

27. *Myers v. United States*, *supra* note 25, at p. 167.

and subordinates. The only problem is to what extent this degree of privacy and immunity should extend. For example, confidential communications to and from the President are inviolate to a judicial request, assuming confidentiality a fact,²⁸ and as to a Congressional demand, the question is legally open but usually adjusted politically.²⁹ Where heads of departments are involved, and also inferiors connected with policy, the mantle of the President's privilege is usually bestowed, although here again a "political question" or political adjustment will enter. Insofar as inferiors and employees are concerned, and where policy is not involved, then obviously there is no privacy or immunity.³⁰

§ 129. — The Pardoning Power

The President is empowered, In Art. II, § 2, cl. 1 "to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." We have already seen in § 112, that while the judiciary has the power to punish for a criminal contempt, the President has the power to pardon it, and that where the two collide, the President can be curbed only by impeachment.³¹ The pardoning power was at first held limited by the person's acceptance, but today it appears that a person cannot reject a substituted and statutorily authorized lesser penalty.³² Insofar as the legislature is concerned, it cannot control the power of the President, or exclude any class of offenders, and is therefore unable to limit or condition a pardon, although the President may pardon absolutely or conditionally, commute sentences, and remit fines, penalties, and forfeitures.³³ The leading

28. *Marbury v. Madison* (1803) 1 Cr. 137, 143-145, 2 L.Ed. 60 contains the colloquy between the Attorney General and the Court on this.

29. E. g., the response of President Kennedy to the chairman of a House special subcommittee: "As you know, this Administration has gone to great lengths to achieve full cooperation with the Congress in making available to it all appropriate documents, correspondence and information. This is the basic policy. . . . Executive privilege can be invoked only by the President and will not be used without specific Presidential approval." *N. Y. Times*, March 13, 1962.

30. Of course there are "secret agent" and "secret agency" instances where even Congress desires no publicity, or as little as is necessary, e. g., the C. I. A.

31. *Ex parte Grossman* (1925) 267 U.S. 87, 45 S.Ct. 332, 69 L.Ed. 527. The judiciary cannot indefinitely suspend a sentence, as it amounts to a condonation and thereby usurps the President's power, *Ex parte United States* (1916) 242 U.S. 27, 37 S.Ct. 72, 61 L.Ed. 129, although a shortened sentence at the same term by judicial amendment is upheld. *United States v. Benz* (1931) 282 U.S. 304, 51 S.Ct. 113, 75 L.Ed. 354.

32. *United States v. Wilson* (1833) 7 Pet. 150, 8 L.Ed. 640, followed in *Burdick v. United States* (1915) 236 U.S. 79, 35 S.Ct. 267, 59 L.Ed. 476, although modified, if not reversed, in *Biddle v. Perovich* (1927) 274 U.S. 480, 47 S.Ct. 664, 71 L.Ed. 1161.

33. Except paid into the Treasury or to an informer. *Illinois Central R. Co. v. Bosworth* (1890) 133 U.S. 92, 10 S.Ct. 281, 33 L.Ed. 550.

case in this pardoning area is *Ex parte Garland*, in which Mr. Justice Field wrote:

"The power thus conferred is unlimited, with the [Constitutional] exception stated. It extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.

"Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities, consequent upon conviction, from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.

"There is only this limitation in its operation; it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment. . . ." ³⁴

§ 130. The President and the Legislature—In General

The separation doctrine is not sufficient to prevent the Executive from entering the domain of the Legislature, at least to some extent. "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute."³⁵ Here is a source of conflict, and disagreement may also occur in other areas, e. g., appointments and removals, treaties, the (required) expenditure of voted and

34. *Ex parte Garland* (1867) 4 Wall. 333, 380, 18 L.Ed. 366 (Garland later became the Attorney General); see also *United States v. Klein* (1872) 13 Wall. 128, 20 L.Ed. 519, upholding the President's power to issue a general amnesty, although under the Necessary and Proper Clause Congress itself may enact

a general amnesty statute. The *Laura* (1885) 114 U.S. 411, 5 S.Ct. 1881, 29 L.Ed. 147; *Brown v. Walker* (1896) 161 U.S. 591, 16 S.Ct. 644, 40 L.Ed. 819.

35. *Youngstown Sheet & Tube Co. v. Sawyer* (1952) 343 U.S. 579, 587, 72 S.Ct. 863, 96 L.Ed. 1153.

earmarked funds.³⁶ As already noted in § 123, the President may be a delegatee of Congress, and within this area he does exercise legislative powers to the extent granted and permitted;³⁷ the President, however, may also be a delegator, albeit no known delegation to Congress has occurred. Finally, the powers of these two departments may conflict when the President seeks to act as commander-in-chief. All of these situations are examined below.

§ 131. — In Particular—The Veto Power

The veto power is probably the strongest Presidential weapon in his dealings with Congress. Under Art. I, § 7, cl. 2, every bill requires a Presidential approval or a "return [of] it, with his Objections to that House in which it shall have originated.

. . . If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law." In other words, the President may: (1) sign; (2) veto; (3) not return (assumes not signed) within ten days (a) while Congress is in session, it becomes a law, or (b) during which Congress adjourns, it does not become a law, i. e., the pocket veto.³⁸

The President is not limited to signing bills only while Congress is in session.³⁹ As seen, he may sign after an adjournment if within ten days, and all he need do is to sign the bill; he need not write anything on the bill, e. g., "approved," or even a date. If the latter is not so written, Congress may resort to any pertinent source of information, for a bill becomes law upon its approval by the President. A bill, however, may contain its own effective date, otherwise it is the date of such approval.

36. For example, this last area is well illustrated in the 1962 situation involving the B-70 program. Congress desired continued production; the President desired a cut-back. Congress therefore desired to incorporate an "order" for the planes in its appropriation bill, referring to its power under Art. I, § 8, cl. 12, "to raise and support Armies," with the committee chairman saying: "I think the time has come when we must determine whether the function of the Congress is solely a negative one, in that it can withhold authority, or funds and prevent something from being done, but can't exercise a positive authority by affording the

means, require something to be done." N. Y. Times, March 8, 1962, p. 10, col. 4. See further § 137, n. 68, *infra*.

37. See quotation in § 123, subd. 1 thereof, in Justice Jackson's opinion.

38. See also § 150, *infra*. We do not discuss cl. 3 since its restrictions are not much followed and it apparently was not completely understood by the framers.

39. *La Abra Silver Mining Co. v. United States* (1899) 175 U.S. 423, 453, 20 S.Ct. 168, 44 L.Ed. 223. See also Corwin, ed., *The Constitution* (1953) p. 103, giving citations.

§ 132. — — The Appointing and Removal Powers

Within the executive establishment the President has complete power to appoint and remove heads of departments and policy officials; as to other inferior officers and employees, Congress may control. Insofar as the lower-rung officials and governmental employees are appointed or removed, and otherwise have tenure, by and under Civil Service Laws, there can be no problem; but what of those officials who, while not heads of departments, are still much more than "inferior officers," and who, while appointed by the President, are provided for by a law which requires the legislative will to be effectuated? This, in effect, was the situation in 1933. Humphrey had been nominated in 1931 by President Hoover to succeed himself as a member of the Federal Trade Commission, and was confirmed by the Senate and duly commissioned to serve until 1938; President Roosevelt took office in 1933 and on July 25th of that year wrote Humphrey asking for his resignation on the ground "that the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection," but not casting any reflections upon the Commissioner personally; after some correspondence, Humphrey refused to resign whereupon the President removed him. Humphrey never acquiesced in this act, insisted he remained an F.T.C. official, and after his death in 1934 his executor, Rathbun, sued in the Court of Claims for the salary. The Court of Claims certified two questions to the Supreme Court: (1) did the statute, which gave the President power to remove a commissioner "for inefficiency, neglect of duty, or malfeasance in office," restrict or limit such power to only one or more of these causes? If yes, then (2) is this such a restriction or limitation which is permitted under the Constitution? The Supreme Court unanimously answered yes to both questions, reasoning as to the first question as follows:

"The commission is to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi judicial and quasi legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of body of experts 'appointed by law and informed by experience.' . . . [T]he Constitutional intent [was] to create a body of experts who shall gain experience by length of service; a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government. To the accomplishment of these purposes, it is clear the Congress was of opinion that length and certainty of

tenure would vitally contribute. And to hold that, nevertheless, the members of the commission continue in office at the mere will of the President, might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office.”⁴⁰

As to the second question, whether this was an unconstitutional limitation upon the power of the Chief Executive, the reasoning was:

The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. . . .

“If Congress is without authority to prescribe causes for removal of members of the trade commission and limit executive power of removal accordingly, that [executive] power at once becomes practically all-inclusive in respect of civil officers with the exception of the judiciary provided for by the Constitution. . . .

“We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. . . . Mr. Justice Story . . . said that neither of the departments in reference to each other ‘ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers.’ . . .

“The power of removal here claimed for by the President falls within this principle, since its coercive influence threatens the independence of a commission, which is not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments.”⁴¹

§ 133. — — The Conduct of Foreign Affairs—Treaties

By “foreign affairs” numerous areas are suggested, e. g., ambassadorial or consular relations, the stationing of armed

40. *Rathbun v. United States* (1935) 295 U.S. 602, 624, 625–626, 55 S.Ct. 869, 79 L.Ed. 1611.

41. *Ibid.*, at pp. 628, 629, 630. However, where the Congressional intent is not to limit or restrict the President’s power of removal, but

merely to authorize removal for certain causes, then the President may remove for other causes. *Morgan v. T. V. A.* (6th Cir. 1940) 115 F.2d 990, cert. den. (1941) 312 U.S. 701, 61 S.Ct. 806, 85 L.Ed. 1135.

forces overseas, foreign aid, the Peace Corps, treaties and executive agreements, tariffs, to name but a few. In general, the President has exceedingly great powers in this area, for he "is the sole organ of the nation in its external relations, and its sole representative with foreign nations;"⁴² he acts through ambassadors "personally" while consulates may be termed commercial officers, and Congressional power may be here utilized. In all of the fields named there is no constitutional way to prevent the Congress, at some time and in some way, from entering, whether because of its control of the purse or because of a constitutional provision. We examine the constitutional question only of treaties here, and of executive agreements in the next section.

Treaties may first be viewed procedurally and substantively. The Constitution, in Art. II, § 2, cl. 2 gives the President power "by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur. . . ." There are four procedural stages involved, namely, negotiation, submission, consent, and ratification.⁴³ The President can "make" a treaty without interference, that is, negotiations leading up to the actual submission to the Senate for its consent are solely within his exclusive power, for "he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."⁴⁴ Submission requires no Presidential action within any period of time. Actually, the President is under no obligation to submit at all. Once a treaty is submitted to it the Senate may, however, (a) hold hearings, at which it may request information concerning the negotiations; and while it cannot compel production or testimony, it may refuse to proceed further; (b) consent unconditionally by a vote of at least two-thirds of a quorum, i. e., of the present 100 Senators, by at least 34; (c) refuse its consent and reject the treaty by a vote of at least one-third plus one; (d) insist upon amendments to the treaty, by a simple majority vote, which must be accepted by the other nation(s) and results in a change in the original treaty; or (4) make its (two-thirds) consent dependent upon (simple majority) reservations, which limit only the obligations of the United States and not the other party(s), who may nevertheless reject

42. Marshall, as a Congressman, quoted in *United States v. Curtiss-Wright Export Corp.* (1936) 299 U. S. 304, 319, 57 S.Ct. 216, 81 L.Ed. 255, where Mr. Justice Sutherland also felt that in the foreign relations field the federal government, i. e., the President, has inherent powers, and that Congressional delegations in this area are looked upon more favorably than in the domestic one.

43. On this and the following section, see Forkosch, *Treaties and Executive Agreements*, 32 *Chicago-Kent L.Rev.* 201 (1954), analyzing the introduced Bricker Amendment which failed of Senate passage. We do not discuss treaties with the Indian Tribes.

44. *United States v. Curtiss-Wright Export Corp.*, *supra* note 42, at p. 319.

any treaty-plus-reservations as in the case of amendments. The President, of course, may also reject any Senate amendments or reservations and abandon the negotiations. After consent, without amendments or reservations, the Treaty is to be ratified by the President.⁴⁵

Under Art. VI, a ratified treaty becomes the law of the land, even though it is not a legislative act but more nearly a "contract" between two or more nations.⁴⁶ A treaty may be self-enforcing or non-self-enforcing; in the former situation it may confer rights upon persons which enable them to sue, etc., while in the latter situation Congress must enact effectuating legislation.⁴⁷ Suppose a treaty directly conflicts with a Constitutional provision or with a federal statute? In the former, the Supreme Court has indicated, but not directly held, that a treaty is ineffective, while in the latter a self-enforcing treaty repeals earlier federal or state, but not later federal, statutes.⁴⁸ Can a treaty permit Congress to act where it could not before? In the Migratory Bird Case of 1920 an original federal statute protecting birds flying north and south during the seasons was held unconstitutional; a treaty was entered into with Canada; Congress now legislated as before; and its power was upheld because "the national well being" required "national action" since the states "individually are incompetent to act."⁴⁹ A treaty may be terminated by either party, or Congress may repeal a treaty's self-executing clauses (the other party may

45. But suppose the President refuses, can he be judicially compelled? This has never occurred, but the obvious answer is no; impeachment may be the answer, as in *Ex parte Grossman*, supra note 31.

46. *Foster v. Neilson* (1829) 2 Pet. 253, 314, 7 L.Ed. 415. In *Missouri v. Holland* (1920) 252 U.S. 416, 433, 40 S.Ct. 382, 64 L.Ed. 641, Holmes carefully pointed out that while a statute must be made "in pursuance" of the Constitution, a treaty need only be made "under the authority of the United States." A treaty is to be liberally construed, and unless prohibited is to be interpreted as enlarging rights which may be claimed under it. *Nielsen v. Johnson* (1929) 279 U.S. 47, 49 S.Ct. 233, 73 L.Ed. 607.

47. See, e. g., *Ware v. Hylton* (1796) 3 Dall. 199, 1 L.Ed. 568, permitting a British creditor to sue a Virginia debtor because of the 1783 Treaty of Paris, despite a local statute, and see also *Hopkirk v. Bell* (1806) 3 Cr. 454, 2 L.Ed. 497, and *Hauenstein v. Lynham* (1880) 100 U.S. 483, 25 L.Ed. 628, *Clark v.*

Allen (1947) 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633.

48. See Forkosch, *Treaties*, supra note 43, pp. 209-210 for citations. If Congress so acts later on the other nation may, of course, do as it pleases.

49. *Missouri v. Holland*, supra note 46, at p. 433. Holmes argued that no constitutional prohibition against this legislation could be found, and the 10th Amendment was not applicable. Superficially this case appears to be an aberration, but in the light of cases later decided in the 1930's and 1940's, the rationale follows the views given in Chap. X on the Commerce Clause. Furthermore, if Congress has existing powers to act, no treaty need be referred to; where these powers are absent, then the Necessary and Proper Clause may be utilized in aid of a treaty. In *re Ross* (1891) 140 U.S. 453, 11 S.Ct. 897, 35 L.Ed. 581; *Baldwin v. Franks* (1887) 120 U.S. 678, 7 S.Ct. 656, 30 L.Ed. 766; *Neely v. Henkel* (1901) 180 U.S. 109, 21 S.Ct. 302, 45 L.Ed. 448.

thereupon denounce the entire treaty), or abrogation may occur when a war occurs; the political department will determine the extent to which a treaty or its clauses survive the demise of the other party.⁵⁰

§ 134. — — — Executive Agreements

The Constitution speaks of "treaty," "alliance," "confederation," "agreement or compact" (Art. I, § 10, cls. 1, 3), in addition to "treaties" (Art. II, § 2, cl. 2), but we are not given definitions of these terms.⁵¹ Executive agreements are not treaties and therefore need not be procedurally or substantively subjected to the latter's requirements and limitations, although for the purpose of federal jurisdiction they are within the meaning of the Court of Appeals Act.⁵² Very early in our history Congress authorized executive agreements under its powers over postal affairs, trademarks and copyrights, and reciprocal trade and commerce.⁵³ Under his war powers, the control of foreign affairs, and as Commander in Chief, the President also enters into agreements. In 1933 Roosevelt, in an exchange of notes with Litvinov, recognized Russia and various agreements were entered into; these constituted an international compact not requiring Senate consent, and state laws and policies were likewise subject to its provisions.⁵⁴ In 1940 Roosevelt entered into two executive agreements, the first with Canada for mutual defense, and the second with England on the lend-lease of destroyers for bases; these agreements changed our national policy from strict neutrality to the European War into one of a degree of belligerency. Besides these various types of agreements there are arbitration agreements entered into pursuant to treaties providing for them, and Art. 43 of the United Nations Charter calls upon members to enter into special agreements.⁵⁵

50. *Bas v. Tingy* (1800) 4 Dall. 37, 1 L.Ed. 731, *Charlton v. Kelly* (1913) 229 U.S. 447, 33 S.Ct. 945, 57 L.Ed. 1274; *Clark v. Allen* (1947) 331 U.S. 503, 67 S.Ct. 1431, 91 L. Ed. 1633; *Taylor v. Morton* (1855) Fed.Cas.No. 13,799.

51. See, e. g., Taney's efforts to distinguish in *Homes v. Jennison* (1840) 14 Pet. 540, 570-572, 10 L. Ed. 579.

52. *Altaman & Co. v. United States* (1912) 224 U.S. 583, 601, 32 S.Ct. 593, 56 L.Ed. 894.

53. These areas have been the most prolific source for trade agreements, especially with Congressional authority also granted, e. g., the reciprocal trade agreement act of

1934, 48 Stat. 943 (and see also 52 Stat. 973 [1938]). Trade agreements were early upheld. *Field v. Clark* (1892) 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294. See also *United States v. Capps* (1955) 348 U.S. 296, 75 S.Ct. 326, 99 L.Ed. 329; *J. W. Hampton, Jr. & Co. v. United States* (1928) 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624.

54. *United States v. Belmont* (1937) 301 U.S. 324, 330-332, 57 S.Ct. 758, 81 L.Ed. 1134; *United States v. Pink* (1942) 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796; *Tucker v. Alexandroff* (1902) 183 U.S. 424, 22 S.Ct. 195, 46 L.Ed. 264.

55. The United Nations Participation Act of Dec. 20, 1945 imple-

§ 135. The Delegating Power—In General

In § 123 the President has been treated as a delegatee, i. e., a recipient of powers from Congress by a statute delegating it; here we treat him as a delegator, i. e., the one who delegates or sub-delegates power. In the first instance the President, as a delegator, has power as the Chief Executive, and it is in the Constitution that this power is found; in the second instance the President has received power as a Congressional delegatee and now sub-delegates it. In either case it is obvious that the President cannot personally act under all practical situations, and that without delegations by him we could not, for example, wage any war. The overall general approach is discussed at greater length in Chap. IX, which treats of The Federal Administrative Process; here we point up this Presidential power, generally exercised through "Executive Orders" which are analogized to Congressional basic statutes creating agencies and touch upon it again later.⁵⁶

§ 136. The President as Commander in Chief—In General

The various powers of the President are somewhat described in Art. II, § 2, and the first clause confers upon him the title of "Commander in Chief of the Army and Navy of the United States." It may be argued that the President therefore does not have any war powers, for to Congress is given the power "to provide for the common Defence" (Art. I, § 8, cl. 1), "To provide and maintain a Navy" (cl. 13), "To make Rules" for governing and regulating the army and navy (cl. 14), "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" (cl. 15), and "To provide for organizing, arming, and disciplining" this militia (cl. 16). Of the seventeen Congressional powers so enumerated six, plus a portion of one, are thus concerned with war and the powers therefor, so that it may be additionally argued that naming the President as the commander in chief merely gives him a title and provides him with a degree of authority to effectuate the war statutes enacted by Congress.⁵⁷ And, continues the argument, this is especially so in the light of modern warfare. Regardless of these arguments

ments this Art. 43. See S.Doc. 123, 81st Cong., 1st Sess., p. 158.

56. In Chapt. IX the questions of Congressional power, power to delegate, etc. are all equally applicable to the President and his ability to delegate, so that we need not discuss these, and other questions here. We thus now assume Presidential power and delegatability although we can disclose the error of this assumption by mentioning

the veto power over legislation, which certainly cannot be delegated to another.

57. The concurring minority in *Ex parte Milligan* (1866) 4 Wall. 2, 139, 18 L.Ed. 281, so felt in general. It may be observed that Congress "cannot declare war against a State or any number of States, by virtue of any clause in the Constitution." *The Prize Cases* (1863) 2 Bl. 635, 668, 17 L.Ed. 459.

the President, as such commander in chief, has a source for the exercise of powers separate from those elsewhere found in the Constitution or delegated to him by Congress.⁵⁸ For example, Lincoln's claim that the war power could be used to suppress the rebellion was upheld by the Supreme Court in 1863, the following sentence being significant: "Whether the President in fulfilling his duties as Commander in Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted."⁵⁹ And in 1942 Roosevelt's Message to Congress requested legislation which, if not enacted, "I shall accept the responsibility, and I will act," although, he concluded, "When the war is won, the powers under which I act automatically revert to the people—to whom they belong."⁶⁰ Acting under his own, as well as delegated, powers, Roosevelt created numerous agencies between 1940 and 1944, and as Commander in Chief aided in the formulation of the war's grand strategy in his talks with Churchill and Stalin. And likewise acting under that title, the President, through his military commanders, directed the relocation of, and imposition of curfews upon, the West Coast Japanese, citizens and aliens alike; but when these were challenged, the government could also utilize a Congressional ratification and adoption for the forthcoming judicial support.⁶¹ Such a prior Congressional addition to the base of the President's power is of exceeding importance in peacetime (see § 139), while in wartime the President may confidently look to subsequent legislative and judicial ratifications.⁶²

58. See, e. g., *Taney's views in Fleming v. Page* (1850) 9 How. 603, 615, 13 L.Ed. 276, distinguishing between the powers of the President and those lodged in the English Crown, and yet saying that "As commander in chief he is authorized to" do several things.

59. *The Prize Cases*, *supra* note 57, at p. 670.

60. 88 Cong.Rec. 7044, 77th Cong., 2d Sess., Sept. 7, 1942.

61. *Hirabayashi v. United States* (1943) 320 U.S. 81, 92, 63 S.Ct. 1375, 87 L.Ed. 1774; *Korematsu v. United States* (1944) 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194: The question "is not one of Congressional power to delegate . . .

but whether, acting in cooperation, Congress and the Executive have constitutional" power so to do. The answer in both cases was yes. Cf., however, *Ex parte Endo* (1944) 323 U.S. 283, 65 S.Ct. 208, 89 L.Ed. 243.

62. The Supreme Court may, as indicated in the above Japanese Relocation cases, distinguish later so as to deny what it had theretofore permitted; or, as in the *Flag Salute Cases*, reverse when the war fever or threat subsided. *Minersville School District v. Gobitis* (1940) 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375, reversed in *West Virginia State Bd. of Ed. v. Barnette* (1943) 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628.

§ 137. — In Particular—The Armed Forces

The Commander in Chief of the armed forces is a civilian, not a military, official,⁶³ yet Lincoln issued orders in 1862 for a general advance, Wilson determined the independence of the American command in 1918, and Truman ordered the use of the A-bomb in 1945. Although he cannot “declare War,” the President is bound to resist any invasion or rebellion and may call out the armed forces and the militia, proclaim a blockade, and meet “force, by force.”⁶⁴ In time of war the President has unlimited power to dismiss officers, although in time of peace he may be limited by Congress.⁶⁵ Since Congress is empowered “To make Rules for the Government and Regulation” of the armed forces, the President must comply with all such requirements and limitations.⁶⁶ He cannot, under his powers as Commander in Chief, order any seizure of private property in peacetime where Congress has otherwise provided (see § 139), and even during a civil war cannot replace a loyal and functioning judiciary by martial law (see § 138). It is obvious that at any time and under any circumstance the Constitutional power of the purse is lodged in Congress, but it is also obvious that in a shooting war the President may, while Congress is not in session, act.⁶⁷ Is this legislative power to control expenditures “solely a negative one in that it [Congress] can withhold authority of funds and prevent something from being done? Or can it exercise a positive authority and by affording the means require something to be done?”⁶⁸ This con-

63. Estate of Franklin D. Roosevelt, Surr.Ct.1950, N. Y. Times, July 26, 1950, p. 271, col. 1, quoted in Corwin, ed., *The Constitution* (1953) pp. 404-405.

64. The Prize Cases, *supra* note 57. The President also has the power, for example, to order an invasion, *Fleming v. Page* (1850) 9 How. 603, 615, 13 L.Ed. 276, and employ secret agents, *Totten v. United States* (1876) 92 U.S. 105, 23 L.Ed. 605.

65. See, e. g., *Mullan v. United States* (1891) 140 U.S. 240, 11 S.Ct. 788, 35 L.Ed. 489, and *Wallace v. United States* (1922) 257 U.S. 541, 42 S.Ct. 221, 66 L.Ed. 360, and discussion and analysis of cases in *Beard v. Stahr* (D.C.D.C.1961) 200 F.Supp. 766.

66. *Swain v. United States* (1897) 165 U.S. 553, 17 S.Ct. 448, 41 L.Ed. 823.

67. See, e. g., the discussion in *Martin v. Mott* (1827) 12 Wheat. 19, 6 L.Ed. 537.

68. Report of the House Armed Services Committee, N. Y. Times, March 9, 1962, p. 14, col. 7, concerning the production of the RS-70 (B-70) bomber. The executive branch desired to reduce the program, but its request for an appropriation was increased and the Committee's Report desired to include language that “the Secretary of the Air Force, as an official of the Executive branch, is directed, ordered, mandated and required to utilize the full amount” granted for the “production planning and long lead-time procurement” of the bomber. This apparently is the first instance of such language even being proposed by Congress or its committees. The disagreement ended in a compromise, N. Y. Times, March 22, 1962, p. 1, col. 6, and the news report contained this paragraph: “Today Mr. Vinson [Committee Chairman] said he had never wanted to contest this right—a contest that could be legally settled only by impeachment pro-

stitutional problem is a peacetime one, it should be noted, and has not yet been judicially answered because either it will never materialize, or it will be held a political question, or it will be found constitutionally impossible judicially to mandate the President, thus having it remain in the lap of Congress.

§ 138. — — Martial Law

Although the common law does not recognize martial law, the Supreme Court has adopted the view that it can be validly and constitutionally imposed in time of war or insurrection.⁶⁹ The High Court has said that martial law is but one of three kinds of military jurisdiction which can be exercised under the Constitution, the first both in peace and in war; the second in a foreign war or where a civil war or rebellion occurs domestically and the rebels, treated as belligerents, occupy a portion of the country; and the third in time of invasion or insurrection within the United States, or rebellion within the states adhering to the Union, when the public danger so requires it.

“The first of these may be called jurisdiction under military law, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as military government, superseding, as far as may be deemed expedient, the local law; and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated martial law proper, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, but the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.”⁷⁰

In *Ex parte Milligan* an Indiana resident for twenty years, and a citizen of the United States, who had never been in the military service, was arrested at home on October 5, 1864 on order of the military commander. On October 21st he was tried by a military commission and found guilty of conspiracy to commit various acts against the United States. The Supreme Court, in 1866 after the Civil War had ended, upheld a writ of *habeas corpus* because of the lack of jurisdiction in the military to try Milligan, feeling that in Indiana there was then no insurrection, invasion, or re-

ceedings against the President.”
See also § 130, fn. 36, supra.

69. *Luther v. Borden* (1849) 7 How. 1, 12 L.Ed. 581; *Martin v. Mott*, supra note 67.

70. *Ex parte Milligan* (1866) 4 Wall. 2, 142, 18 L.Ed. 281, concurring opinion of Chief Justice Chase. On military law, see § 346, infra.

bellion; its courts were open and functioning to hear criminal accusations and redress grievances; that Congress could grant no power over Milligan, nor could the President proclaim martial law in Indiana, under the facts in the case; and that "Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration."⁷¹ Immediately upon the bombing of Pearl Harbor the Hawaiian Governor proclaimed martial law and conferred on the Commanding General there all his powers as governor and also "all of the powers normally exercised by the judicial officers" during the emergency. President Roosevelt approved this action within 48 hours. In cases reaching it in February of 1945, but not decided until one year later (the surrender of Germany and Japan had occurred by then), the Supreme Court felt that the Organic Act of 1900, under which the Governor had acted, did not intend "to authorize the supplanting of courts by military tribunals" just because the term "martial law" was used, thereby following the Milligan case. Two dissenters felt that "courts must guard themselves with special care against judging past military action too closely by the inapplicable standards of judicial, or even military, hindsight."⁷² This admonition against judicial hindsight is particularly applicable in the Japanese Relocation Cases which involved an Executive Order of February 19, 1942, pursuant to which the military commander in the western states barred all Japanese and persons of Japanese descent from military areas and relocated them, imposed a curfew, and otherwise regulated them. Before such action was taken, however, a Congressional statute ratified and adopted the said Executive Order. The program was upheld in two cases decided in 1943 and 1944 respectively, although in a third case in 1944 the Supreme Court felt the government had gone too far in detaining a concededly loyal American citizen where such "detention . . . has no relationship to that campaign" against espionage and sabotage.⁷³

71. *Ibid.*, at p. 127. See also *Ex parte Quirin* (1942) 317 U.S. 1, 63 S.Ct. 1, 87 L.Ed. 3, where a trial by a military commission of Nazi saboteurs was upheld and the Milligan case distinguished. In *Ex parte Vallandigham* (1864) 1 Wall. 243, 17 L.Ed. 589 while the Civil War was still going on, the Supreme Court felt it had no certiorari power to review the proceedings of a military commission. Insofar as a state's Governor may proclaim martial law, the Supreme Court has held that "What are the allowable limits of military discretion and whether or not they

have been overstepped in a particular case, are judicial questions." *Sterling v. Constantin* (1932) 287 U.S. 378, 53 S.Ct. 190, 77 L.Ed. 375.

72. *Duncan v. Kahanomoku* (1946) 327 U.S. 304, 324, 343, 66 S.Ct. 606, 90 L.Ed. 688. For analogous views, and a continued withdrawal from the area of military prosecutions, see *In re Yamashita* (1946) 327 U.S. 1, 66 S.Ct. 340, 90 L.Ed. 499, and especially the dissent.

73. *Hirabayashi v. United States* (1943) 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774; *Korematsu v. United*

§ 139. — — Seizure of Private Property—In War

The seizure of private property during war may be termed confiscation, as well as seizure. Enemy property is confiscated without any constitutional limitations attaching, and this whether the war is on foreign shores or is domestic or civil.⁷⁴ Seizure of property belonging to those not enemies involves different considerations, for now constitutional rights do enter, and this whether the seizure is at home or abroad. For example, in 1943 the President, without any Congressional statutory authority, but in order to avert a nation-wide strike of miners, seized the coal mines and had his agents operate them. The owners sued in the United States Court of Claims, arguing that a "taking" under the Eminent Domain Clause of the 5th Amendment had occurred and that they were therefore entitled to "just compensation." The Supreme Court unanimously upheld their contention that a taking had occurred.⁷⁵ If the property had been overseas, and the armed forces (their Commander in Chief being the President) had seized it for its own subsequent use, compensation might be required, but not if the army had seized it so as to destroy what "had become a potential weapon of great significance to the invader. It was destroyed, not appropriated for subsequent use."⁷⁶ In the coal mine seizure case the concurring Justice wrote:

"This is a temporary taking. The relatively new technique of temporary taking by eminent domain is a most useful administrative device: many properties such as laundries, or coal mines, or railroads, may be subjected to public operation only for a short time to meet war or emergency needs, and can then be returned to their owners. However, the use of the temporary taking has spawned a host of difficult problems, . . . especially in the fixing of just compen-

States (1944) 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194; *Ex parte Endo* (1944) 323 U.S. 283, 300, 65 S.Ct. 208, 89 L.Ed. 243, also feeling that the cases were decided on a basis of "interpreting a war-time measure [where] we must assume that their [the President and Congress] purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war." For an illustration of national hysteria entering the picture, see Taft, *The Federal Trials of the IWW*, 3 *Labor History* 57 (1962).

74. *Miller v. United States* (1870) 11 Wall. 268.

75. *United States v. Pewee Coal Co.* (1951) 341 U.S. 114, 71 S.Ct. 670,

95 L.Ed. 801. Although one Justice concurred, and four dissented, these five did agree with the other four that a taking had occurred, although they disagreed on the consequences. For additional seizures under the President's constitutional powers, see *Mitchell v. Harmony* (1852) 13 How. 115, 14 L.Ed. 75, *United States v. Russell* (1872) 13 Wall. 623, 20 L.Ed. 474, *Portsmouth Harbor Land & Hotel Co. v. United States* (1922) 260 U.S. 327, 43 S.Ct. 135, 67 L.Ed. 287.

76. *United States v. Caltex (Philippines), Inc.* (1952) 344 U.S. 149, 155, 73 S.Ct. 200, 97 L.Ed. 157. Justices Black and Douglas dissented, feeling just compensation was due the owners.

sation. . . . Temporary takings can assume various forms. There may be a taking in which the owners are ousted from operation, their business suspended, and the property devoted to new uses. . . . A second kind of taking is where, as here, the Government, for public safety or the protection of the public welfare, 'takes' the property in the sense of assuming the responsibility of its direction and employment for national purposes, leaving the actual operations in the hands of its owners as government officials appointed to conduct its affairs with the assets and equipment of the controlled company" ⁷⁷

The major judicial difficulty is in the fixing of just compensation because of the taking, permanent or temporary, and on this the Justices have divided in the past to where "Each case must be judged on its own facts." ⁷⁸

§ 140. — — — In Peace

Peacetime seizures are treated differently than when a war is in progress. In the mine seizure case of 1943, discussed in § 139, the additional factor is found that Congress had not there legislated upon or provided for the contingency which compelled the seizures. Peacetime emergencies, however, may occur in economic or political (cold war) situations and unquestionably the judiciary is more inclined to support Presidential power in the latter. Although "emergency does not create powers, emergency may furnish the occasion for the exercise of power." ⁷⁹ In the Steel Seizure Case of 1952 a dispute had arisen between the coal unions and the companies in 1951 over a new collective bargaining agreement, and on December 18th the union served a note of intention to strike when the existing contract expired that December 31st. The Federal Mediation and Conciliation Service intervened but to no avail, and the President referred the dispute to the Federal Wage Stabilization Board on December 22, but its report and recommendation were not well received by the parties. On April 4, 1952, the union again gave notice of a nationwide strike to begin on April 9th. A few hours before the deadline the President issued Executive Order No. 10340 which directed Secretary of Commerce Sawyer to take possession of and operate most of the nation's steel mills. He did so, having the various company presidents continue as operating managers for the United States. On

77. *United States v. Pewee Coal Co.*, supra note 75, at pp. 119-120.

78. *United States v. Caltex*, supra note 72, at p. 156. See also § 346, *infra*, for additional discussion.

79. *Home Building & Loan Ass'n v. Blaisdell* (1934) 290 U.S. 398, 426,

54 S.Ct. 231, 78 L.Ed. 413, upholding the Minnesota Mortgage Moratorium Act as against the objection, among others, that it impaired the obligations of a contract in defiance of the Contract Clause in Art. I, § 10, cl. 1.

April 10th, and again twelve days later, the President sent messages to Congress on his actions, but Congress did nothing. The companies meanwhile immediately sued for a judicial declaration of the invalidity of the orders of the President and Sawyer, and sought temporary and permanent injunctions. On April 30th the federal District Court granted a preliminary injunction, but on the same day the Court of Appeals stayed it; the Supreme Court granted certiorari on May 3d, and set the cause down for argument on May 12th. Argument was held on May 12th and 13th, and a decision rendered on June 2d which affirmed the injunction and denounced the seizure, three Justices dissenting.⁸⁰

✓ The "majority" opinion of Mr. Justice Black, in beginning the constitutional discussion, felt that "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute" which expressly or impliedly upholds the seizure, and those which do authorize the President to act under certain conditions (e. g., war) do not apply as "these conditions were not met" It is clear that if the President had authority to issue the order he did, it must be found in some provision of the Constitution." And since no such express provision is found, the government's only possible contention is that it is an implied one, namely, that it is implied from Art. II's vesting of the executive powers in the President, in directing him to faithfully execute the laws, and in making him the Commander in Chief. All these sources were rejected, and attention was called to the debates on the 1947 Taft-Hartley Act during which "Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency." Furthermore, the Congressional plan of dealing with national emergency peacetime strikes was to use all the known devices of mediation, conciliation, investigation, and public reports, with a temporary injunction being available in some instances so as to provide a cooling-off period. "All this failing, unions were left free to strike after a secret vote by employees as to whether they wished to accept their employers' final settlement offer." Thus, concluded the opinion, it is Congress alone which can legislate such a seizure under these circumstances.

Mr. Justice Frankfurter's review of the Taft-Hartley legislation compelled him to conclude that "Congress has expressed its will to withhold this [seizure] power from the President as though it had said so in so many words," and in effect Mr. Justice Jackson

80. *Youngstown Sheet & Tube Co. v. Sawyer* (1952) 343 U.S. 579, 72 S. Ct. 863, 96 L.Ed. 1153. Separate opinions were written by Justices Black, Frankfurter, Douglas, Jackson, Burton and Clark, who composed the majority, and by Chief

Justice Vinson for the dissenting minority which included Justices Reed and Minton who concurred in Black's opinion, as did Jackson and Burton, and apparently Douglas, but Clark concurred only in the judgment.

also so held. Mr. Justice Burton thought that the Taft-Hartley (Congressional) procedure should have been followed, as did Mr. Justice Clark, even though "the Constitution does grant to the President extensive authority in times of grave and imperative national emergency." To the argument that a foreign war was then actively in existence Mr. Justice Jackson countered with the view that only Congress could declare a war, absent any other fact, and the "Korean enterprise" was not a war. For "no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture."⁸¹ The entire bench would probably have agreed that any Presidential action involving the nation's internal economy, though an emergency is pleaded and even upheld, is subject to Congressional revision and disallowance, although it might have been that a bare majority would have agreed that the President possessed a residual of resultant power besides or because of his granted powers to deal with emergencies in the absence of conflicting legislation.

81. The quotations are found at pages 585, 586, 587, 602, 642, 643,

and 662, although not in the order given in the text.

Chapter VIII

THE FEDERAL LEGISLATIVE POWER IN GENERAL

§ 145. Introductory—Powers and Limitations in General

The constitutional tripartite division of powers into legislative, executive, and judicial has, in effect, been somewhat followed to this point, for Chapter VI discussed the judicial, Chapter VII the executive, and now we discuss the legislative powers. However, one practical difficulty confronts us, namely, that the legislative powers are so enormous and diversified that we just cannot compress them satisfactorily within one chapter. We therefore first organize the Congress, describe its functioning, and discuss its powers and limitations generally; then in Chapter IX we discuss the legislative delegations to administrative agencies; in Chapter X the federal commerce power is next examined intensively; and in Chapter XI all the other legislative powers are briefly analyzed; finally in Chapter XII, the so-called "police powers" of the federal government are brought into the picture. Even this analysis does not suggest that we have plumbed all of the Congressional powers for, as we have already seen, that body exercises powers over the judiciary (Chap. II), concerning amendments (Chap. IV), and in numerous aspects of the federal system (Chap. III); furthermore, the legislative powers and functions are specifically broadened so as to embrace the effectuation of the powers of the other two departments, as 162, *infra*, discloses. Since we have already elaborated, in Chapter V, the various kinds and types of powers which are available to the federal government, we do not discuss them further.

§ 146. Congress—Organization and Structure—In General

The opening Article, section, clause and words of the Constitution at once vest all legislative powers "in a Congress of the United States which shall consist of a Senate and a House of Representatives." These two bodies must therefore be created and organized, which is exactly what § 2 does for the House, and § 3 for the Senate. Sections 4 through 7 then take up various aspects of both Houses, e. g., the elections for congressmen and their qualifications, the internal affairs of each House, the manner of originating and passing bills, and adjournments. Once the Congress is thus a going body its powers are delineated in § 8, and limitations are then set forth in § 9 (those upon the states in § 10). In this chapter we discuss all of the preceding save for § 8 (in the chapters which follow) and § 10 (in Chapter XIII).

§ 147. — — Qualifications and Election of Members

Congressmen must comply with certain qualifications which the Constitution sets forth: Representatives must be at least 25, and Senators 30, years of age; the former must have been a federal citizen for at least 7 years, and the latter 9; and both, when elected, must be inhabitants of the state in which chosen. A state may not increase these qualifications, for example, by requiring a person to be a member of a district from which elected to the House for at least 12 months, but whether Congress may so do is moot.¹ Each body "shall be the Judge of the Elections, Returns and Qualifications of its own Members," but during his tenure a Congressman may not hold any other federal civil office. Representatives are elected by the people of each state every two years, while Senators are chosen for six year terms, although one-third of them are elected every second year² (simultaneously with Representatives); if a vacancy occurs in the House or the Senate, the Governor of the State calls a special election to fill it, except that for the Senate vacancy, and if the state's legislature has so authorized, he may fill it temporarily by appointment until an election as directed by the legislature occurs (17th Amendment). Each state is entitled to elect two Senators (having one vote each in that body) and at least one Representative, with Art. I, § 2, cl. 3 providing for a decennial census upon which representatives are to be apportioned among the states.³

§ 148. — — — Control of Elections

Although federal offices are involved, the Constitution specifically provides that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of Chusing Senators." The 15th and 19th Amendments prevent "the right of citizens of the United States to vote" from being abridged by the states, or by Congress, "on account of race, color, or previous condition of servitude" or "on account of sex,"

1. In *Burton v. United States* (1906) 202 U.S. 344, 369-370, 26 S.Ct. 688, 50 L.Ed. 1057, a Senator ran afoul a law which rendered him "incapable of holding any office," but the statute was construed so as not to affect his tenure; the power of Congress to disqualify was left undecided.

2. The Senate is therefore a continuing body. *McGrain v. Daugherty* (1927) 273 U.S. 135, 181-182, 47 S.Ct. 319, 71 L.Ed. 580.

3. By the Act of June 18, 1929, 46 Stat. 21, Congress has restricted the House to 435; the act also provides penalties for those who refuse to answer the questions of the census taker, etc., 13 U.S.C. § 209. On the question of apportionment within a state and the power of the judiciary to enter this area, see § 462, *infra*, and also *fn.* 5, *infra*.

and both Amendments give "Congress . . . power to enforce this article by appropriate legislation."⁴ In 1842 Congress for the first time acted and required the election of representatives by districts,⁵ and beginning with 1870, as part of the Reconstruction legislation, passed comprehensive civil rights measures making it a federal offense for a state official to register falsely, bribe, vote illegally, make a false return, interfere with elections, and to neglect any duty required of him by state or federal law.⁶ Congressional regulations "supersede those made by the state, so far as the two are inconsistent, and no farther." And if state or local officials are elected with federal representatives, "Congress will not thereby be deprived of the right to make regulations in reference to the latter."⁷ Federal control over state election procedures was extended to state primaries in which a congressman was nominated, and the 15th Amendment was also held to apply to a state's primary as well as its election.⁸ The current use of § 241

4. The Act of 1870 was held unconstitutional where it applied solely to state elections, see note 6, *infra*.

5. 5 Stat. 491 (1882), renewed in 1862, 12 Stat. 572. See *Colegrove v. Green* (1946) 328 U.S. 549, 66 S. Ct. 1198, 90 L.Ed. 1432, holding the federal Reapportionment Act of 1929 did not deprive the states of their political right to gerrymander districts, although in *Baker v. Carr* (1962) 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663, decided March 26, 1962, the Court held that under the 14th Amendment's Equal Protection Clause a federal court might examine such a lack of re-districting in defiance of a state's Constitutional requirements where the result would be discriminatory (see also Chap. XX, § 462, *infra* on this); see also, in general, discussion in *Ex parte Yarbrough* (1884) 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274, upholding an indictment for a conspiracy to violate the federal "voting" laws. Of course under Art. II, § 1, cl. 4, Congress determines the time and the (uniform) day of choosing electors who vote for a President and a Vice President.

6. See e. g., 16 Stat. 140, 144, 254 (1870) 16 Stat. 433 (1871), 17 Stat. 347 (1872), repealed as to election items but continuing the Civil Rights matter, 28 Stat. 36 (1894). In *United States v. Mosely* (1915) 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355, it was held that the general

provisions of the remaining and other statutes would still prohibit interference with the right to vote for a Congressman. However, only federal and not purely local officers may be so protected, *United States v. Reese* (1876) 92 S.Ct. 214, 23 L. Ed. 563. The major surviving criminal provisions of the Civil Rights Act are in 18 U.S.C.A. §§ 241-242, and their history is traced in *United States v. Williams* (1951) 341 U.S. 70, 83, 71 S.Ct. 581, 95 L. Ed. 758.

7. *Ex parte Siebold* (1880) 100 U.S. 371, 386, 393, 25 L.Ed. 117, holding state election judges guilty of the federal law in stuffing ballot boxes in violation of a state law. See also *United States v. Saylor* (1944) 322 U.S. 385, 64 S.Ct. 1101, 88 L. Ed. 1341.

8. *United States v. Classic* (1941) 313 U.S. 299, 61 S.Ct. 1031, 85 L. Ed. 1368; *Smith v. Allwright* (1944) 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987. A state's repeal of its primary laws, thereby permitting primaries to be held by the political parties, was denounced as a subterfuge in *Rice v. Elmore* (4th Cir. 1947) 165 F.2d 387, cert. den. (1948) 333 U.S. 875, 68 S.Ct. 904, 92 L.Ed. 1151, as were oaths thereafter required of Negroes (and whites) to support race separation, etc. as a condition of voting in the party primary. *Brown v. Baskin* (E.D.S.Car.1948) 78 F.Supp. 933, 80 F.Supp. 1017, *affd.* (4th Cir. 1949)

of the federal statutes is to prosecute election frauds, and only rarely to prosecute violence or intimidation which interferes with the franchise right.⁹ The poll tax, which requires payment thereof before being allowed to register and vote for federal or state or both offices at elections, was held not to come within the condemnation of the 19th Amendment,¹⁰ and Congressional attempts to condemn being unsuccessful, an amendment (24th) is pending;¹¹ literacy requirements have been utilized in some states to control voting eligibility,¹² and in 1962 a question arose in Congress whether the discriminatory use of state literacy tests to deny the ballot to Negroes or other minorities could be prevented by a federal statute or whether a Constitutional amendment was required.¹³ The result was negative, that is, on May 9th, and later on May 14, 1962, motions to close debate (and thereby prevent any filibuster) were defeated by votes of 53 to 43, and 52 to 42, the bill's proponents being unable to muster even a majority, much more the required two-thirds.

§ 149. — — Immunities of Members

The Constitution grants two immunities to Congressmen, first, that except for treason, felony, and a breach of the peace, they are "privileged from Arrest during their Attendance" at

174 F.2d 391. The Hatch Act makes it a misdemeanor to intimidate, etc. any voter at a federal election, and while its constitutionality has not been challenged (upheld as to § 9, *United Public Workers v. Mitchell* [1947] 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754), it has been held not to apply to primaries. *United States v. Malphurs* (S.D. Fla.1941) 41 F.Supp. 817, *revsd. other grnds.* (1942) 316 U.S. 1, 62 S.Ct. 897, 86 L.Ed. 1227. See also § 358, *infra*, for additional discussion.

9. Emerson and Haber, *Political and Civil Rights in the United States* (1952) pp. 269, 277.

10. *Breedlove v. Suttles* (1937) 302 U.S. 277, 58 S.Ct. 205, 82 L.Ed. 252.

11. See proposed bill and citations in Emerson and Haber, *Political Rights*, *supra* note 9, at pp. 286-288; see p. 90, note 7, *supra*, for amendment.

12. See, e. g., *Davis v. Schnell* (S.D. Ala.1949) 81 F.Supp. 872, *affd. per cur.* (1949) 336 U.S. 933, 69 S.Ct. 749, 93 L.Ed. 1093 (state requirement voters "understand and explain" federal Constitution held unconstitutional); in *Lassiter v.*

Northampton County Board of Elections (1959) 360 U.S. 43, 79 S.Ct. 985, 3 L.Ed.2d 1072, a North Carolina requirement that a voter be able to read and write any section of the state's Constitution in the English language was upheld, the *Schnell* case being distinguished. See also *Franklin v. Harper* (1949) 205 Ga. 779, 55 S.E.2d 221, *app. dism.* (1950) 339 U.S. 946, 70 S.Ct. 791, 94 L.Ed. 1360 (state requirement voters be able to read and write, and otherwise understand and explain, a paragraph of the Georgia or federal Constitution held good as against an omnibus attack under the 14th and 15th Amendments).

13. This has not yet been settled, and a bill which provided, in effect, that anyone with a sixth-grade education would be presumed literate, was opined to be constitutional and unconstitutional by about the same number of lawyers, etc. *New York Times*, March 19, 1962, p. 33, col. 4; simultaneously an anti-poll tax measure was placed in the same general opinion area. *Ibid.*, March 13, 15, 22, 1962, p. 34, col. 2.

sessions of their body, and, second, that "for any Speech or Debate in either House, they shall not be questioned in any other Place." (Art. I, § 6, cl. 1). The first immunity is of little practical value, for its exceptions withdraw all criminal offenses and arrests therefor from the privilege, and it does not apply to the service of any process in a civil or criminal matter.¹⁴ The second immunity is liberally construed and includes not alone opinion, speeches, debates, or other oral matter, but also voting, making a written report or presenting a resolution, and in general to whatever a congressman feels necessary to transact the legislative functions and business. Even a claim of a bad motive does not destroy the immunity, for it is the public good which is thereby served.¹⁵

§ 150. — Functioning in General

Each House of Congress controls and determines the rules of its own proceedings (Art. 1, § 5, cl. 2),¹⁶ keeps its own journals and publishes them (cl. 3),¹⁷ and cannot adjourn during any session for more than three days without the consent of the other (cl. 4). All revenue bills must originate in the House but the Senate may thereafter amend, etc. (§ 7, cl. 1). Every bill passing both Houses must be approved and signed by the President before it becomes a law (on the veto, see § 131, *supra*) although a Presidential veto may be overruled by a two-thirds vote of each body (cl. 2). The primary, if not sole, function of Congress is to legislate, but its practical functioning is found in its committees and subcommittees, and these must be examined in particular.

14. *Williamson v. United States* (1908) 207 U.S. 425, 446, 28 S.Ct. 163, 52 L.Ed. 278, *Long v. Ansell* (1934) 293 U.S. 76, 83, 55 S.Ct. 21, 79 L.Ed. 208, *United States v. Cooper* (1800) 4 Dall. 341, 1 L.Ed. 859.

15. See, e. g., *Tenney v. Brandhove* (1951) 341 U.S. 367, 377, 71 S.Ct. 783, 95 L.Ed. 1019, *Kilbourn v. Thompson* (1881) 103 U.S. 168, 203-205, 26 L.Ed. 377.

16. In *United States v. Ballin* (1892) 144 U.S. 1, 12 S.Ct. 507, 36 L.Ed. 321, a House rule was upheld which counted members present but not voting in the determination of a quorum to transact business. See also *United States v. Smith* (1932) 286 U.S. 6, 52 S.Ct. 475, 76 L.Ed. 954 (Senate's rules did not

warrant reconsideration of the confirmation of an appointee to the Federal Power Commission).

17. The Journal of either House is presumed to be true and correct and a statement of the presence of a quorum is final. *United States v. Ballin*, *supra* note 16, at p. 4. However, an enrolled bill, duly passed, signed and approved by all persons, and deposited in the Department of State, cannot be impeached by a Journal record. *Field v. Clark* (1892) 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294, *Flint v. Stone Tracy Co.* (1911) 220 U.S. 107, 143, 31 S.Ct. 342, 55 L.Ed. 389, although see *Christoffel v. United States* (1949) 338 U.S. 84, 69 S.Ct. 1447, 93 L.Ed. 1826.

§ 151. — — In Particular—The Investigating Power of Committees

To legislate Congress must have information, facts, details, else it enacts laws in a vacuum. Additionally, Congress must itself be able to investigate past and existing conditions to determine not alone what the facts are, but whether and what kind or type of legislation may be required. In 1792 the House appointed a committee of its own to investigate the disaster which had befallen a general and his army, and to enable the committee to obtain the facts, empowered it to "call for [i. e., subpoena] such persons, papers, and records as may be necessary to assist their inquiries."¹⁸ This investigatory power, however, was not found in the Constitution, and it was not until a century and a quarter later that the Supreme Court held definitely that such a "power is so far incidental to the legislative function as to be implied."¹⁹ In other words, if the function of Congress is to legislate, then whatever means are necessary and proper, and are not prohibited, may be implied; and in this instance, unless so implied, "Congress could be seriously handicapped in its efforts to exercise its constitutional function wisely and effectively."²⁰ The manner in which this investigatory power may be exercised is by either House itself and directly so resolving, or appointing a committee therefor and granting it such powers, or additionally granting the committee power to create a subcommittee to which these powers in turn may be subdelegated. The usual method is by the second or third, and the creating resolution must be specific and clear as to what and why the investigation is being conducted, and the power to investigate by subpoena and subpoena duces tecum must be granted without ambiguity. If a subcommittee so functions it must report to its parent body, the committee, which in turn then reports to its own parent body, House or Senate, which then acts or functions as required. These procedures are of importance.²¹ There are, of course, limitations upon this power, of a procedural (just described) and substantive (see § 154, *infra*) nature. The investigating power of Congress is here discussed in two aspects, first, the power to compel a witness to appear, and second, after such an appearance, voluntary or involuntary, the power to compel the appearing witness to answer questions. The first aspect is analysed in §§ 152–158, and the second in § 159.

18. 3 Annals of Cong. 493 (1792).

19. *McGrain v. Daugherty* (1927) 273 U.S. 135, 161, 47 S.Ct. 319, 71 L. Ed. 580, examining the background and also numerous cases.

20. *Quinn v. United States* (1955) 349 U.S. 155, 161, 75 S.Ct. 668, 99 L.Ed. 964, citing the *McGrain* case.

21. See, e. g., the statements of what these procedures are in the *McGrain* (*supra* note 19) and *Kilbourn* (*infra* note 26) cases.

§ 152. — — — — To Investigate the Executive Department

The vacillation of the Supreme Court concerning the power of Congress to investigate the Executive Department, and compel the attendance of executive personnel, was ended in 1927 when it used sweeping terms in upholding an inquiry into the administration of the Department of the Interior and to sift charges of graft, corruption and malfeasance.²²

§ 153. — — — — To Subpena Witnesses in Aid of Legislation

The similar vacillation of the Supreme Court, with respect to the power of Congress to subpoena private persons and documents, and to investigate private affairs, in order to carry out its legislative function, was likewise ended in 1927.²³

§ 154. — — — — Limitations and Requirements

Since for all powers there must be limitations, what, besides those of a procedural nature (see § 151, *supra*), are there which restrict this investigatory power of Congress? Speaking for a practically unanimous bench the Chief Justice, in 1955, wrote as follows:²⁴

“But the power to investigate, broad as it may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose. [§ 155] Nor does it extend to an area in which Congress is forbidden to legislate. [§ 156] Similarly, the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary. [§ 157] Still further limitations on the power to investigate are found in the specific individual guarantees of the Bill of Rights, such as the Fifth Amendment’s privilege against self-incrimination” [§ 159]

22. *McGrain v. Daugherty* *supra* note 19, at pp. 177–178, reiterated in *Quinn v. United States*, *supra* note 20, at p. 161, fn. 21.

23. *Ibid.*, at pp. 154, 175 and pp. 160–161 respectively.

24. *Quinn v. United States*, *supra* note 20, at p. 161, giving citations. Only Justice Reed dissented from the entire majority opinion, Justice Harlan dissenting from only another portion, and Justice Minton only insofar as Reed’s dissent applied to a companion case.

§ 155. — — — — A Valid Legislative Purpose

In 1881 the Supreme Court's "loose language"²⁵ was to the effect that unless it was shown that legislation was contemplated as a result of the investigation, it would hold that its purpose was improper, i. e., prying into affairs with which only the judiciary could deal; shortly thereafter the presumption was changed so that the purpose was deemed legitimate, that is, that "it was certainly not necessary that the resolution should declare in advance what the Senate meditated doing when the investigation was concluded;" and finally the investigation was presumed a good faith one in aid of legislation.²⁶ The Supreme Court has also permitted an investigation and required disclosure where the person was involved in a court suit and claimed that the Senate was attempting to aid the prosecution, for this Congressional power "is not abridged because the information sought to be elicited may also be of use in such suits."²⁷ So, too, and despite objections of a constitutional nature, so long as a legislative purpose is served by the investigation the judiciary will not interfere on the basis of the motives influencing the committee's member.²⁸ "We have no doubt that there is no congressional power to expose for the sake of exposure. The public is, of course, entitled to be informed concerning the workings of its government."²⁹

§ 156. — — — — An Area Congress Cannot Enter

The limitations upon Congress, upon the President, and upon the Judiciary found in the specific individual guarantees of the Bill of Rights are equally binding upon and applicable to the committees and subcommittees discussed here. Although Justices

25. Mr. Justice Frankfurter's characterization of the Kilbourn case in *United States v. Rumely* (1953) 345 U.S. 41, 73 S.Ct. 543, 97 L.Ed. 770.

26. *Kilbourn v. Thompson* (1881) 103 U.S. 168, 192-196, 26 L.Ed. 377, *In re Chapman* (1897) 166 U.S. 661, 670, 17 S.Ct. 677, 41 L.Ed. 1154, *McGrain v. Daugherty*, *supra* note 19, at p. 178, the last opinion saying: "The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating, and we think the subject-matter was such that the presumption should be indulged in that this was the real object. An express avowal of the object would have been better; but in view of the particular subject-matter was not indispensable."

27. *Sinclair v. United States* (1929) 279 U.S. 263, 295, 49 S.Ct. 268, 73 L.Ed. 692.

28. *Barenblatt v. United States* (1959) 360 U.S. 109, 79 S.Ct. 1081, 3 L.Ed.2d 1115, a 5-4 decision (see also note 35, *infra*). On the same day a state committee's similar legislative investigation was upheld as against the fear of "exposure for exposure's sake." *Uphaus v. Wyman* (1959) 360 U.S. 72, 79 S.Ct. 1040, 3 L.Ed.2d 1090. The *Barenblatt* case was followed in *Wilkinson v. United States* (1961) 365 U.S. 399, 81 S.Ct. 567, 5 L.Ed.2d 633, and *Braden v. United States* (1961) 365 U.S. 431, 81 S.Ct. 584, 5 L.Ed. 2d 653.

29. *Watkins v. United States* (1957) 354 U.S. 178, 200, esp. fn. 33, 77 S.Ct. 1173, 1 L.Ed.2d 1273.

Douglas and Black dissented from the majority opinion of Justice Frankfurter in *United States v. Rumely*, they concurred in the decision, which rejected defendant's conviction for contempt. There the majority felt no constitutional issue need be reached as the House resolution could be interpreted so as not to include, and therefore deny, to the committee the power it claimed; the concurring Justices felt the committee did have the power delegated to it and therefore the constitutional question had to be answered. That question was phrased and answered by the majority as follows: "the power to inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote from the radiations of influence which they may exert upon the ultimate legislative process, raises doubts of constitutionality in view of the prohibition of the First Amendment." ³⁰ The minority felt that Congress itself could make no law abridging freedom of speech or of the press; consequently "The power of investigation is also limited. Inquiry into . . . any matter in respect to which no valid legislation could be had" therefore was unconstitutional.

§ 157. — — — — Law Enforcement

Although termed "loose language" in 1953 when he wrote for the majority, two years later Justice Frankfurter apparently concurred in having *Kilbourn v. Thompson* cited by the Chief Justice in support of the statement that the powers of law enforcement are assigned to the Executive and the Judiciary and that neither Congress nor its committees may therefore investigate within this area.³¹ In 1953 the dissenters cited and used that case to support their views, and two years later also concurred with the Chief Justice.³² In the *Kilbourn* opinion, which was unanimous, the Court did not "deem it necessary to discuss the proposition that if the investigation which that [House] committee was directed to make, was one that was judicial in character and which could only be properly and successfully made by a court of justice, and if it related to a matter in which relief or redress could be had only by a judicial proceeding, that the power attempted to be exercised was one confided by the Constitution to the judiciary and not to the legislative department of the government." ³³ There the Preamble

30. *United States v. Rumely*, supra note 25, at p. 46. The minority quotation is at pp. 57-58. On 1st Amendment protections of free speech and association in connection with Congressional investigations, see § 329 et seq.

31. Characterized in *Rumely* case, note 25, supra, and cited in *Quinn* case, note 20, supra, at p. 161, fn.

24. The *Kilbourn* case is at note 26, supra.

32. Dissenters' citation in *Rumely*, supra note 29, and concurrence in *Quinn* case, note 20, supra.

33. Supra note 26, at p. 193. Compare the overall subject-matter, presumption, etc. in the *Kilbourn* case with that in the *McGrain* case, note 19, supra.

to the resolution recited that the government was a creditor of a bankrupt then before a federal district court, referred to a real-estate pool in which the bankrupt had been interested, mentioned a settlement by the trustees "to the disadvantage and loss" of the creditors, including the government, and concluded that since "the courts are now powerless, by reason of said settlement, to afford adequate redress to said creditors," then a special committee of the House was "appointed to inquire into the nature and history of said real-estate pool, and the character of said settlement, with the amount of property involved," etc. The Court said that "We think it equally clear that the power asserted is judicial and that it is not legislative."

§ 158. — — — — Compelling Attendance of Recusant Witnesses

The Teapot Dome scandals during the administration of President Harding involved Harry M. Daugherty, who was Attorney General between 1921 and 1924. Late in that period the Senate, and subsequently the House, upon the basis of charges of misfeasance and malfeasance, passed two resolutions, one taking certain contemplated litigation out of the hands of the Department of Justice and placing it in those of a special counsel to be appointed by the President, and the second "authorizing and directing a select committee of five senators 'to investigate circumstances and facts, and report the same to the Senate, concerning . . .'" the entire matter. The resolution authorized the committee to subpoena witnesses and documents. The committee issued a subpoena and a subpoena duces tecum directed to Mally S. Daugherty, President of a bank in Ohio and the brother of the Attorney General, but Mally failed to appear; thereafter a second subpoena, but now without reference to books, etc., was served upon Mally, but again he failed to appear; each time no excuse was offered for these failures to appear. The committee reported all this to the Senate which adopted a resolution reciting the inquiry, purposes, facts, and procedures, and then resolved and commanded that the President *pro tempore* of the Senate issue a warrant to the sergeant at arms of the Senate, or his deputy, to arrest Mally and bring him "before the bar of the Senate" to answer questions, "and to keep the said M. S. Daugherty in custody to await the further order of the Senate." The warrant was executed by the deputy, McGrain, who arrested Mally in Ohio; the latter obtained a writ of *habeas corpus* from the federal district court there; the court held the arrest unlawful as the Senate had exceeded its powers; on a direct appeal the Supreme Court unanimously reversed, holding the Senate had the power of inquiry, its purpose was proper, the procedures correct, that all had not been "abusively and oppressively exerted," and "that the Senate is en-

titled to" arrest Mally "to have him give testimony pertinent to the inquiry, either at its bar or before the committee" ³⁴

§ 159. — — — — Compelling Answers of Witnesses

Once a witness has appeared, regardless of how, questions are asked of him or books and records are required to be produced. In either case the witness may contend that the limitations, procedural and substantive, examined above, apply, and that these uphold his refusal, or right, not to answer. For example, a witness may thus claim the protection of the Fifth Amendment's clause against self-incrimination, i. e., refusing to answer questions which may tend to subject him to criminal penalties or forfeitures,³⁵ although it is for the judiciary to determine when and under what circumstances the protection may be invoked, i. e., "Once more the Court is required to resolve the conflicting constitutional claims of congressional power and of an individual's right to resist its exercise."³⁶ Since 1857 Congress has provided for criminal proceedings and penalties to be invoked against a recusant (§ 157) or recalcitrant (this section) witness.³⁷ The present law states that "Every person who having been summoned as a witness . . . willfully makes default, or who, having appeared, refuses to answer any question pertinent to the inquiry, shall be deemed guilty of a misdemeanor" ³⁸ Under this statute "part of the standard of criminality is the pertinency of the questions propounded to the witness, that the witness is entitled to be apprised of the object of the inquiry so as to show the connective tissue between the questions asked and the claimed power of the committee, and that the witness must be apprised that the commit-

34. Supra note 19, at p. 214. The Court also felt the Senate to be a continuing body so that the matter had not become moot due to its adjournment. On this see *Anderson v. Dunn* (1821) 6 Wheat. 204, 231, 5 L.Ed. 242, holding the imprisonment could not extend beyond the adjournment of the body ordering it. See also § 159, *infra*. As to the production of papers, see *Jurney v. MacCracken* (1935) 294 U.S. 125, 147, 150, 55 S.Ct. 375, 79 L.Ed. 802. On present procedures and penalties, see § 159, *infra*, and note 38.

35. *Quinn v. United States*, supra note 20, at p. 161, "which is in issue here." See also *McCarthy v. Arndstein* (1924) 266 U.S. 34, 45 S.Ct. 16, 69 L.Ed. 158. The privilege is personal and cannot be claimed by another, *Hale v. Henkel* (1906) 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed.

652, or by a corporation to protect its records, *Wilson v. United States* (1911) 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 771, and does not apply to possible state application. *United States v. Murdock* (1931) 284 U.S. 141, 52 S.Ct. 63, 76 L.Ed. 210. In the *Barenblatt* case, supra note 28, the constitutional claim included the First Amendment and the prohibition against a bill of attainder.

36. *Barenblatt v. United States*, supra note 28, at p. 218; *Hoffman v. United States* (1951) 341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118.

37. Held unconstitutional in *Re Chapman* (1897) 166 U.S. 661, 17 S.Ct. 677, 41 L.Ed. 1154.

38. 2 U.S.C.A. § 192. For a statutory grant of immunity, see 18 U.S.C.A. § 3486.

tee demands his answer notwithstanding the objections made by the witness to answering the question.”³⁹

§ 160. Powers of Congress—In General

In §§ 13–15, and throughout the pages which followed, various powers of Congress were discussed; in the preceding eight sections still other powers were analyzed; and in the Chapters to come we continue this discussion. The statement made in § 145, that the powers of Congress “are so enormous and diversified that we just cannot compress them satisfactorily within one chapter,” is therefore an understatement, as we do not even now go into the general powers of the legislature; in Chapter XI we will trace many not covered separately elsewhere. In the next two sections we discuss the judicial powers of Congress, as well as the necessary and proper powers.

§ 161. — In Particular—The Judicial Power

In § 3, *supra*, the Articles of Confederation were digested. Art. IX contained the general and specific grants of power to the national government and, in its second paragraph provided that Congress “shall also be the last resort on appeal in all disputes and differences . . . between two or more states” on boundary claims “or any other cause whatsoever,” and then gave procedural details. There was thus a background of Congressional holding, if not exercise, of some form of the judicial power, and the Founding Fathers could be expected to continue the principle. The Constitution, in several places, gives to the Congress, or to either or each House, power which is of a judicial nature, although judicial rules, principles, concepts, etc. are not applicable or required. Thus under Art. I, § 2, cl. 5, the House impeaches, while pursuant to § 3, cl. 6, the Senate has “the sole Power to try all Impeachments.” The judicial atmosphere is further enhanced when, if it is the President who is being tried, “the Chief Justice shall pre-

39. *Davis v. United States* (6th Cir. 1959) 269 F.2d 357, 361, citing *Watkins v. United States* (1957) 354 U.S. 178, 77 S.Ct. 1173, 1 L.Ed.2d 1273, and *Quinn v. United States*, *supra* note 20. For illustrations of the application and use of this statute, see the cases cited in note 28, *supra*.

In *Russell, et al. v. United States* (1962) 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240, the convictions of six men who refused to answer questions relating to communism were reversed. None of them had refused to answer on the ground

of self-incrimination; their refusals ranged from the 1st Amendment's protections to others; the reversal was based upon the ground that the indictments merely said the questions “were pertinent” to the subject under inquiry without identifying the subject, and this was held defective. The government is apparently free to seek new and valid indictments, but now the question of substantive merits (assuming nothing further on the procedural aspects is raised) can be argued.

side" Under cl. 7 the "Judgment" of the Senate cannot extend further than removal from office, etc., although the party convicted is still subject to indictment and trial in a regular court of law. Under § 5, cl. 1, "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members," and under cl. 2 "may determine the Rules of its Proceedings, punish its Members for Disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member." ⁴⁰

The trial of impeachments is further controlled by Art. II, § 4, which refers to "The President, Vice President and all civil Officers of the United States," and then states that they "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Under Art. III, § 3, cl. 1, treason is defined, and a limitation placed upon convictions, namely, two witnesses are required or a confession in open court, while cl. 2 grants to Congress the "Power to declare the Punishment of Treason" subject to one limitation not here material. Thus if treason is used as the basis for any House impeachment and Senate conviction the only punishment which the Senate can impose is that found in Art. II, § 4; Congress may establish the death penalty for treason under its powers granted in Art. III, § 3, cl. 2; and, since Art. I, § 3, cl. 7 permits the impeached and convicted official still to be tried in a court of law, the death penalty may eventually be visited upon him.

§ 162. — — The Necessary and Proper Clause

In § 14, *supra*, the Necessary and Proper Clause was set forth, and it was pointed out that it was not only a general grant to Congress to effectuate the seventeen enumerated powers preceding it in Art. I, § 8, but that the grant was also to execute "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." In §§ 96-101 the various aspects of power in general were discussed, and the Clause was shown to have been used by Marshall in deriving the principle of implied powers to support the federal ability to charter a bank. In other words, this Clause is a reservoir of undefined powers and of undetermined scope, and permits Congress not alone to use any appropriate means reasonably adapted to effectuate its own powers, but also permits it to share in the responsibilities (powers?) of the other two departments. The extent to which the Clause serves as a support for Congressional acts is enormous; it is impossible here to list all statutes and cases. Merely as an illustration, Congress may, with the aid of this

40. In such a proceeding, i. e., to expel a member, the House and the Senate exercise a judicial function and therefore have the power of

subpena. In *re Chapman*, *supra* note 37; *Barry v. United States ex rel. Cunningham* (1929) 279 U.S. 597, 49 S.Ct. 452, 73 L.Ed. 867.

Clause (and others): discharge treaty obligations; create, define and punish crimes and offenses it creates; charter a bank, make treasury notes legal tender; abrogate gold clauses; charter corporations for a variety of purposes; distribute and empower the exercise of the judicial power; authorize the removal of cases from the state courts, create legislative courts and "clothe them with functions deemed essential or helpful in carrying those powers into execution;" and within the reach of its admiralty jurisdiction, revise and amend the maritime law, which nevertheless prevents Congress from making state compensation laws applicable to maritime cases.⁴¹

§ 163. Limitations Upon Congress—In General

With powers go limitations, and those upon Congress are many and varied. For example, there are the separation doctrine (§ 9, *supra*), the system of checks and balances (§ 10), the power of judicial review (Chap. II), and the limitations discussed in §§ 102–105. Later, in Chapter XIII, the states' powers will be seen as a possible source for the conflict with the federal government which is examined in Chapter XIV, and all of Part C's chapters in effect limit the governments, including Congress where applicable, e. g., Chapter XV. Several limitations, and types of limitations, have been or will be sufficiently analyzed not to require further discussion here. The next two sections therefore examine two particular sources of limitations upon Congress.

§ 164. — In Particular—Article I, § 9

In § 103, *supra*, numerous clauses of the Constitution were cited and discussed as examples of the express limitations upon the federal government. Those found in Article I were set forth, but while § 9 was mentioned it was not closely examined. Although its clauses apply to the entire federal government, and they may thus be cited as limitations upon all three departments, several are peculiarly applicable, if not limited, to Congress; for convenience they are all here discussed.

41. *Neely v. Henkel* (1901) 180 U.S. 109, 21 S.Ct. 302, 45 L.Ed. 448; *Missouri v. Holland* (1920) 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641; *United States v. Fox* (1878) 95 U.S. 670, 672, 24 L.Ed. 538; *Ex parte Yarbrough* (1884) 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 224; *Julliard v. Greenman* (1884) 110 U.S. 421, 4 S.Ct. 122, 28 L.Ed. 204; *Norman v. Baltimore & Ohio R. Co.* (1935) 294 U.S. 240, 303, 55 S.Ct. 407, 79 L.Ed. 885; *Sloan Shipyards v. United States Fleet Corp.* (1922)

258 U.S. 549, 42 S.Ct. 386, 66 L.Ed. 762; *Rhode Island v. Massachusetts* (1838) 12 Pet. 657, 721, 9 L.Ed. 1233; *Chicago & N. W. R. Co. v. Whitton* (1872) 13 Wall. 270, 287, 20 L.Ed. 571; *Ex parte Bakelite Corp.* (1929) 279 U.S. 438, 449, 49 S.Ct. 411, 73 L.Ed. 789; *Detroit Trust Co. v. The Thomas Barlum* (1934) 293 U.S. 21, 55 S.Ct. 31, 79 L.Ed. 176, *Knickerbocker Ice Co. v. Stewart* (1920) 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834.

There are eight clauses in this Section, and all except the first two begin with "No." The first clause is obsolete because of a built-in time limitation, and is therefore not of importance today. Clause 2 prevents the suspension of the writ of habeas corpus "unless when in Cases of Rebellion or Invasion the public Safety may require it." The Supreme Court has said that the federal courts derive their authority to issue these writs solely from statutes enacted by Congress, although judicial interpretation may conceivably enlarge such jurisdiction.⁴² Its use is quite broad, will test deportation and selective service orders,⁴³ and its suspension solely by Presidential action was challenged by Taney,⁴⁴ although Congress thereafter authorized it.⁴⁵ Clause 3 prevents the passage of any bill of attainder or ex post facto law; the former prohibits all statutes, "no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial;"⁴⁶ the latter applies only to penal or criminal statutes and prohibits any law which either makes criminal an act innocent when done, or inflicts a greater punishment.⁴⁷ Clause 4 prohibits a direct tax unless in proportion to the census, and Art. I, § 2, cl. 3 requires that "direct Taxes shall be apportioned among the several States," etc. The 16th Amendment, however, has given Congress "power to lay and collect taxes on income . . . without apportionment among the several States, and without regard to any census or enumeration." This Amendment was the result of the bare majority decision in 1894 holding that a tax on income from real or personal property was a direct tax and therefore unconstitutional because not apportioned as per the census.⁴⁸ Nevertheless, the distinction between a direct and an indirect tax is still of importance for upon it depends the power of Congress to, for example, enact an estate tax as an excise, a graduated tax on gifts *inter vivos*, a tax on the annual production of mines, and a stamp tax on the sale of securities.⁴⁹ Clause 5 prohibits any tax or duty

42. Ex parte Bollman (1807) 4 Cr. 75, 101, 2 L.Ed. 554, Price v. Johnston (1948) 334 U.S. 266, 282, 69 S. Ct. 1049, 92 L.Ed. 1356. For additional discussion, see § 307.

43. See Forkosch, Administrative Law (1956) § 322 for cases and details.

44. Ex parte Merryman (1861) Fed. Cas.No. 9,487.

45. 12 Stat. 755 (1863), validity assumed in Ex parte Milligan (1866) 4 Wall. 2, 18 L.Ed. 387.

46. United States v. Lovett (1946) 328 U.S. 303, 315, 66 S.Ct. 1073, 90 L.Ed. 1252. See also § 308.

47. Calder v. Bull (1798) 3 Dall. 386, 390, 1 L.Ed. 648; Burgess v. Salmon (1878) 97 U.S. 381, 384, 24 L. Ed. 1104. See also § 309.

48. Pollock v. Farmers' Loan & Trust Co. (1895) 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759.

49. New York Trust Co. v. Eisner (1921) 256 U.S. 345, 41 S.Ct. 506, 65 L.Ed. 963; Bromley v. McCaughn (1929) 289 U.S. 124, 50 S. Ct. 46, 74 L.Ed. 226, Stanton v. Baltic Mining Co. (1916) 240 U.S. 103, 36 S.Ct. 278, 60 L.Ed. 546; Thomas v. United States (1904) 192 U.S. 363, 24 S.Ct. 305, 48 L.Ed. 481.

from being laid on articles exported from any state, and this means only to a foreign country, not to an unincorporated territory of the United States, and does not prevent a tax on income from the export trade of a corporation.⁵⁰ Clause 6 prevents any preferences from being given as between ports because of their location in different states, but does not forbid all discrimination, e. g., under its commerce powers Congress may establish ports of entry, build and maintain lighthouses, improve harbors, etc.⁵¹ Clause 7 really limits the Executive Department, for it prevents money from being drawn from the treasury except by virtue of an appropriation made by law, so that Congress may direct payment of any claim for any reason.⁵² Clause 8 prevents any title of nobility being granted, and no official or employee of the United States, without the consent of Congress, may accept any present, emolument, etc. from any King, Prince, or foreign state.

§ 165. — — The Executive and the Judiciary

The limitations upon the powers of Congress exercised by the President and the Supreme Court have been discussed in Chapters VII and II (also VI), respectively. The workings of the separation doctrine and of the system of checks and balances there analyzed make it unnecessary to repeat them here.

50. *Dooley v. United States* (1901) 183 U.S. 151, 22 S.Ct. 62, 46 L.Ed. 128; *Peck & Co. v. Lowe* (1918) 247 U.S. 165, 38 S.Ct. 432, 62 L.Ed. 1049.

51. *Louisiana Public Service Commission v. Texas & N. O. R. Co.* (1931) 284 U.S. 125, 52 S.Ct. 74, 76 L.Ed. 201; *Pennsylvania v. Wheeling & Belmont Bridge Co.* (1856) 18 How. 421, 15 L.Ed. 435; *South Carolina v. Georgia* (1876) 93 U.S. 4, 23 L.Ed. 782.

52. *Cincinnati Soap Co. v. United States* (1937) 301 U.S. 308, 57 S.Ct. 764, 81 L.Ed. 1122, *United States v. Price* (1885) 116 U.S. 43, 6 S.Ct. 235, 29 L.Ed. 541. Even if a judgment is obtained against the United States, without an appropriation there is no power to pay it. *Reeside v. Walker* (1851) 11 How. 272, 13 L.Ed. 693. On a Congress-President disagreement concerning the spending of appropriated funds, see § 130, note 36, and § 137, note 68, *supra*.

Chapter IX

THE FEDERAL ADMINISTRATIVE PROCESS

§ 170. Introduction—The Fourth Department—A Constitutional Field

The constitutional tripartite division of the federal government into legislative, executive and judicial departments, with the separation of all of the powers of the government among them, to which is added the system of checks and balances, eventually had to result in an unwieldy and impossible situation. During the early decades of the nation the economic, social, and political situation may have permitted the government to function with a modicum of employees, but this could not continue. The increase in the number of employees, however, meant that either the elected or appointed departmental officials had to oversee too much. And the scope of their work erupted beyond their individual abilities to know, understand, or make policy decisions save on the highest of levels. How could government be carried on without these difficulties? To analogize the method used in private economy, a specialized business is engaged to perform a specialized task, e. g., poll taking, testing of materials, the Rand Corporation. The "agency" concept here found, that is, hiring such a specialized agency and empowering it to function as such for the particular purpose(s) desired, could easily be utilized in government. The Founding Fathers did not fully realize the eventual fruition of the administrative process but, today, it has progressed to the point where, between Articles III and IV, another Article III½ is impliedly found, which we here call The Administrative Article. In reality it has grown like Topsy to where it is the modern Fourth Department of government. But, with its powers, there must be limitations. Because this fourth department affects every person in every field of daily endeavor from birth to death, it is of great legal importance; and it is therefore treated in some detail but from a constitutional point of view solely.¹

This constitutional point of view requires that we first define the area or field of our analysis. As § 181, *infra*, discloses, the procedural right of due process of law, that is, of notice and hearing, is not a right every person has under all circumstances. Such a procedural right, under the constitution, exists only when a person's substantive right to life, liberty, or property is being

1. Throughout this Chapter we lean heavily upon Forkosch, *A Treatise on Administrative Law* (1956) hereafter cited as Forkosch, *Ad-*

ministrative, which goes into all of the numerous details of the administrative process which are not here touched upon or considered.

taken, and we term these substantive areas a constitutional field. In other fields, i. e., non-constitutional ones, there is no such a procedural constitutional right, for example, in fields such as pensions, grants, government contracts, etc. As Brandeis wrote, "Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress."² In these non-constitutional fields no constitutional rights are involved and therefore cannot be "taken" from anyone, so that procedural due process of law is not a requirement; by statute, however, these may be required (§ 183). In this Chapter we analyze only situations occurring in a constitutional field, i. e., where property or other constitutional rights of persons are in some manner being impaired or diminished or taken away, so that procedural due process of law is a constitutional requirement.

§ 171. The Power to Delegate in General—By the Executive and the Legislature

The fourth department consists of administrative authorities, boards, commissions, licensors, bureaus, etc., all of which are here termed agencies. These agencies are created by one or more of the three constitutional departments, and to them are delegated powers; without these latter the agencies would be impotent. The Constitution has not left this area untouched.³ The Preamble discloses that "We the People of the United States . . . do ordain and establish this Constitution," and in the opening clauses of each of the first three Articles they "grant" or "vest" legislative, executive, and judicial powers in the three departments they create; besides this wholesale and then particularized grant to and within each such created department, the Constitution elsewhere mentions existing others to whom particular grants are made, e. g., in Art. I, § 2, cl. 4, the Executive Authority of each state is given power to issue writs of election to fill vacancies occurring in that state's representation in the House of Representatives; § 3, cl. 2 (and the 17th Amendment) likewise delegates such authority for Senate vacancies, subject to the wishes of the state's legislature; § 4, cl. 1, gives

2. *Lynch v. United States* (1934) 292 U.S. 571, 577, 54 S.Ct. 840, 78 L. Ed. 1434. The court held, however, that War Risk policies of insurance were contracts and therefore property, and created vested rights. For additional material and citations in this field, see Forkosch, *Administrative*, pp. 54-60.

3. Prior to the formation of the Union the colonies, the Congress under the Articles of Confederation, and the states utilized boards and administrators for much of their work. Gellhorn, *Federal Administrative Proceedings* (1941) pp. 3-4.

to the states the power to prescribe "The Times, Places and manner of holding Elections for Senators and Representatives," subject to the power of Congress to alter; Art. II, § 2, cl. 2 gives the Congress power to "vest," i. e., delegate or subdelegate the appointment power in various persons, including the heads of departments; and, throughout, the states are given innumerable tasks. The President and the Congress are also given specific or implied powers to do things through, or have them done by, others; for example, in Art. I, almost the entirety of § 8's enumeration of Congressional powers illustrate this statement, and in Art. II, § 2, cl. 1, which makes the President the Commander in Chief of the armed forces, also empowers him to "require the opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices"

By discussing only the delegations by and the delegating powers of the President and the Congress we do not imply that the Supreme Court, within its own domain, cannot also have such a power; for example, it certainly can appoint rules committees, and masters and other fact-gathering persons. However, it is not these narrow and intra-judicial delegations which reign over so much of the economic and social activities of the country; rather, it is the executive and legislative delegations with which we are concerned. Further, the independent regulatory agencies created by Congress have a more vital impact upon us than do Presidential agencies; and, additionally, both come under the same rules of constitutional law we here discuss; therefore our analysis emphasizes the legislative, but does not ignore the executive, agency.

§ 172. — By Necessity

The President of the United States is the nation's chief executive, head of the military establishment, in charge of foreign affairs, must oversee the faithful execution of the laws, and is the manager of the sprawling federal establishment, to mention but a few of his duties and responsibilities. "The President's duty in general requires his superintendence of the administration; yet this duty cannot require of him to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to such services, which, nevertheless, he is, in a correct sense, by the Constitution and laws required and expected to perform."⁴ This impossibility of personal Presidential effectuation or superintendence is recognized in his constitutional and judicial ability to delegate.

4. *Williams v. United States* (1843)
1 How. 290, 296, 11 L.Ed. 135.

The first series of agencies created and chosen under the Constitution were the cabinet officials or heads of departments appointed by Washington, and into 1887 these, with several others of a comparable nature, sufficed. In the Granger Cases the Supreme Court upheld the power of the states to determine reasonable rates for railroads passing through their respective jurisdictions, and to regulate businesses affected with a public interest; but shortly thereafter this permission was revoked when the Court realized that interstate commerce was involved and affected.⁵ The void had to be filled by a uniform federal, if not many and varied state, law, and since the power involved was legislative, i. e., the fixing of rates, it was constitutionally natural and jurisdictional for Congress now to act. But a body of three or four hundred lawmakers is unable to undertake the multitudinous and continuing investigations and details required before one or many reasonable rate structures can be set, and so an agency had to be created for this purpose.⁶ As Chief Justice Hughes wrote, "administrative agencies [were] entrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the legislature. The vast expansion of this field of administrative regulation [was] in response to the pressure of social needs."⁷ Or, as Elihu Root phrased it, "The necessities of our situation have already led to" the administrative agency method.⁸ Even the Supreme Court has agreed, stating that "Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility."⁹ And another "reason for the expansion of administrative agencies has been the recognition that procedures appropriate for the adjudication of private rights in the courts would be inappropriate for the kind of determinations which administrative agencies are called upon to make."¹⁰

5. *Munn v. Illinois* (1877) 94 U.S. 113, 24 L.Ed. 77; *Wabash, St. Louis & Pacific R. Co. v. Illinois* (1886) 118 U.S. 557, 7 S.Ct. 4, 30 L.Ed. 244.

6. This first federal agency to effectuate the national powers under the Commerce Clause with respect to rate-making was the Interstate Commerce Commission. 24 Stat. 379 (1887), 34 Stat. 589 (1906), 41 Stat. 484 (1920). Prior thereto, and beginning with its first session in 1789, Congress had created an agency to handle veterans' claims, an office of collector of customs, etc.; these, however, did not deal with roads and railroads. In 1862 (12 Stat. 489) Congress chartered the

Union Pacific Company, and in 1866 (14 Stat. 66) authorized the railroads in a state to connect with those in another state to form one continuous line. The 1887 statute was, nevertheless, the first independent agency so created and endowed with such powers.

7. *Morgan v. United States* (1938) 304 U.S. 1, 14, 58 S.Ct. 773, 82 L. Ed. 1129.

8. Presidential Address, 41 *Amer. Bar. Ass'n Rev.* 355, 368 (1916).

9. *Sunshine Anthracite Coal Co. v. Adkins* (1940) 310 U.S. 381, 398, 60 S.Ct. 907, 84 L.Ed. 1263.

10. Justice Frankfurter, dissenting in *Ansbacker Radio Corp. v. F. C.*

§ 173. — Constitutional Limitations Upon Congress—Possessing the Power to be Delegated

In § 171 we emphasized the importance of the legislative, as against the executive, delegation, and also said that both came under the same general principles and limitations of constitutional law; therefore, we concluded, we would concentrate upon the legislative agency. This means that Congress is our point of departure. And it further means that if any agency is to claim Congress as its creator and delegator, then Congress must, first, possess the particular power involved (§ 173), and, second, be able to delegate this power (§ 174). There are limitations in the Constitution upon both these requirements, and in addition the judiciary has imposed a third (§ 175). As to the first, that is, the possession of the power, both Congress and the Executive have numerous powers which have already been, and later will also be, discussed, so that it is not necessary here to list or examine them again. For present purposes we may assume the possession of the necessary powers.

§ 174. — — Possessing the Ability to Delegate the Power

There are numerous powers which the President has which, for example, cannot be delegated to another to perform, e. g., appoint someone else to act as Commander in Chief, or have others make nominations for him, or send a State of the Union message to Congress, or approve or veto legislation.¹¹ Congress, too, cannot delegate various powers, e. g., to declare war, impeach and try an official, admit new states. The reason for this inability to delegate these powers is that the Constitution grants them to a specific person or body to perform, and that it would be unthinkable for some one other than Congress, for example, to be able to plunge the nation into war. And, to these particularized inability to delegate there is added the judicial concept that even if delegation is possible, still the "whole power" cannot be dele-

C. (1945) 326 U.S. 327, 335, 66 S.Ct. 148, 90 L.Ed. 108. See also veto message of President Roosevelt: "Court procedure is adapted to the intensive investigation of individual controversies. But it is impossible to subject the daily routine of fact finding in many of our agencies to court procedure. . . ." H.Doc. # 986, 76th Cong., 3d Sess. (1940) p. 1.

11. See also the judicial interpretation of a statute which now was held to require the personal exercise of Presidential judgment in

dismissing an officer after a court martial. *Runkle v. United States* (1887) 122 U.S. 543, 7 S.Ct. 1141, 30 L.Ed. 1167. However, the Supreme Court beat a hasty retreat by creating presumptions and inferences, and eventually holding otherwise in fact, if not in law. *United States v. Page* (1891) 137 U.S. 673, 11 S.Ct. 219, 34 L.Ed. 828; *United States v. Fletcher* (1893) 148 U.S. 84, 13 S.Ct. 522, 37 L.Ed. 378; *United States ex rel. French v. Weeks* (1922) 259 U.S. 326, 42 S.Ct. 505, 66 L.Ed. 965.

gated.¹² But all this does not mean that Congress and the President are bereft of any ability to delegate some or other of the powers they possess. For example, the President himself cannot "take Care that the Laws be faithfully executed," so that he needs must have others to whom this power, or a portion of it, may be delegated. For example, the President not only "speaks and acts through the heads of the several departments,"¹³ but is able, within his own executive department, to delegate to any departmental or agency head, or official requiring Senate confirmation, any function he has requiring his personal approval or ratification.¹⁴ So, too, is it impossible for Congress itself to coin money, or establish post offices and roads, and the list here may be continued at length. This leads to the conclusion that, as was previously quoted, "Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility."¹⁵ Thus, for example, "The fixing of rates is a legislative act," said the Supreme Court, but in "Exercising its rate-making authority, the legislature has a broad discretion. It may exercise that authority directly, or through the agency it creates or appoints to act for that purpose."¹⁶

§ 175. — — The Requirement for Standards in the Delegation

The doctrine of the separation of powers, if logically pursued, leads to incongruous results. Of necessity this could not be. Therefore delegations had to be permitted. But legal habits and mind-sets seldom die but linger on as they fade away. So, even though today the judiciary has made almost an about-face in its original views concerning delegations, old cases and opinions still remain available for quotation. Thus one may cite and quote to the effect that "the legislative power of Congress cannot be delegated," or that "Congress cannot delegate legislative power to the President,"¹⁷ and then be confronted by delegations in fact

12. This corollary of the separation doctrine is not of much present interest or application. See, e. g., *Hampton, Jr. & Son v. United States* (1928) 276 U.S. 396, 406, 48 S.Ct. 348, 72 L.Ed. 624. None of the three departments has ever transferred or delegated its "whole power" to any agency or person, much less to one of the other two departments. On this latter aspect Madison, in *The Federalist* # 47, wrote that "where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted.

13. *Wilcox v. Jackson* (1839) 13 Pet. 498, 10 L.Ed. 264.

14. 64 Stat. 419 (1950) 65 Stat. 712 (1951), 3 U.S.C. § 301 et seq. This statute, of course, does not remove the question of the constitutionality of the delegation itself.

15. *Supra* note 9.

16. *St. Joseph Stock Yards Co. v. United States* (1936) 298 U.S. 38, 50, 56 S.Ct. 720, 80 L.Ed. 1033.

17. *United States v. Shreveport Grain & Elevator Co.* (1932) 287 U.S. 77, 85, 53 S.Ct. 42, 77 L.Ed. 175, *Field v. Clark* (1892) 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294.

which have been upheld as constitutional. One of the neanderthal residues is the judicially-imposed concepts of "standards," which in effect reflects the Supreme Court's early fear that too much power could not be delegated without a limitation being imposed in the delegating statute. Thus, "since Congress can not delegate any part of its legislative power except under the limitation of a prescribed standard,"¹⁸ the question arises, why desire a satisfactory standard? The answer is that by requiring satisfactory standards, which in constitutional theory set limits upon the scope of the powers delegated and to be exercised, the judiciary felt that Congress would be required to limit itself and its delegates.¹⁹ But, while one may concede the value of a limitation upon a delegation,²⁰ how does this comport with the standards later upheld by the Supreme Court as satisfactory? For example, what does "public interest," or "public interest, convenience, or necessity," mean? Or "unduly or unnecessarily complicate the structure" of a corporate holding company system?²¹ The current view is that safeguards are important and must be imposed, else Cardozo's phrase of "delegation running riot"²² becomes a fact, but that these safeguards need not necessarily be found in the requirement of standards. The delegator always has the power to call the tune or withdraw its delegation, regardless of political considerations. "The early formalistic tendency was to exact a mechanical adherence to the 'open sesame' type of statute, with approved terms of past delegations being used and re-used; now a functional judicial approach looks to the *raison d'être* of its re-

18. *United States v. Chicago, Milwaukee, St. Paul & Pacific R. R. Co.* (1931) 282 U.S. 311, 324, 51 S.Ct. 159, 75 L.Ed. 359.

19. A delegation was held invalid to private persons, *Carter v. Carter Coal Co.* (1936) 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160, but only two have been denounced where Congress delegated power to governmental agencies. The "hot oil" case, *Panama Refining Co. v. Ryan* (1935) 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446, and the "sick chicken" case, *A. L. A. Schechter Poultry Corp. v. United States* (1935) 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570. But even in this last case the Supreme Court wrote, at pp. 529-530, that "We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the National Legislature cannot deal directly."

20. In the hot oil case, *supra* note 19, at p. 434, Cardozo concurred

with the majority in the necessity for the presence in the basic delegating statute of a "standard reasonably clear whereby discretion must be governed." And in *New York v. United States* (1951) 342 U.S. 882, 884, 72 S.Ct. 152, 96 L.Ed. 662, Justice Douglas, in his dissent, wrote: "Unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty."

21. *New York Central Securities Corp. v. United States* (1932) 287 U.S. 12, 53 S.Ct. 45, 77 L.Ed. 138, *N. B. C. v. United States* (1943) 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344; *American Power & Light Co. v. S. E. C.* (1946) 329 U.S. 90, 67 S.Ct. 133, 91 L.Ed. 103.

22. The *Schechter* case, *supra* note 19, at p. 553.

quirements and seeks for them in ascertainable criteria, the totality of the statute's application, etc." ²³ In essence, therefore, the judicial requirement for standards has not been overthrown or reversed, but the judicial definition or approval of "satisfactory" has broadened to the extreme point where one state court felt that "Where the discretion to be exercised relates to police regulations for the protection of public morals, health, safety, or general welfare, and it is impracticable to fix standards without destroying the flexibility necessary to enable the administrative officials to carry out the legislative will, legislation delegating such discretion without restrictions may be valid." ²⁴

§ 176. The Powers Delegated—Legislative and Executive

The delegators possessing the powers to be delegated, and the delegations being made properly, i. e., constitutionally through valid standards, we must now inquire into what powers are being passed on. Executive delegations may, of course, grant purely executive powers not otherwise constitutionally incapable of being so granted, and in certain instances Congress may also desire to act in the same field. In such a situation one department should delegate to the other, to the end that unified policy and execution result. "Normally Congress supplies the conditions of the privilege of entry into the United States. But because the power of exclusion of aliens is also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise power." ²⁵ Congressional delegations of purely legislative powers also follow the above course, although "It was at first assumed that these [Congressionally-created Regulatory] Boards and Commissions were included entirely within the Executive branch of the Government. The Supreme Court . . . however, held that to a considerable extent such regulatory bodies were independent of the Executive." ²⁶ Thus both of these departments may create agencies and

23. Forkosch, *Administrative*, pp. 109-110, citing cases.

24. *Pressman v. Barnes* (1956) 209 Md. 544, 555, 121 A.2d 816. And see, in general, for cases not going to this length but broadening the language used; *American Power & Light Co. v. S. E. C.*, supra note 21, at p. 105; *Lichter v. United States* (1948) 344 U.S. 742, 785, 68 S.Ct. 1294, 92 L.Ed. 1694; *S. E. C. v. Chenery Corp.* (1943) 318 U.S. 80, 89, 63 S.Ct. 454, 87 L.Ed. 626. For federal cases where no standards were fixed, but the delegations were upheld, see Forkosch, *Administrative*, p. 111, fn. 45, stating:

"It should be noted that these illustrations involve railroads and the public safety, banking and the public welfare, and war and its effective prosecution." And, citing a deportation case, the Chief Justice is quoted: "Impossible standards of specificity are not required."

25. *United States ex rel. Knauff v. Shaughnessy* (1950) 338 U.S. 537, 543, 70 S.Ct. 309, 94 L.Ed. 317.

26. *Sociedad Nacional de Marineros de Honduras v. McCulloch* (D.C. D.C.1962) 201 F.Supp. 82, 85, citing *Rathbun v. United States* (1935) 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611.

enable them to act within their own respective areas of either executive or of legislative powers. But suppose an agency is desired to be created with the power of both executing and legislating, is either delegator able to delegate the other's powers and thereby create an agency which can exercise these dual powers? In §§ 178–181 this question is answered in the affirmative, with the judicial process and power being also included, so that an agency is able to be created and endowed with tripartite powers. While the separation doctrine in strict theory prevents any or all of these three powers, as such, from being delegated, Holmes has stated: "It is said that the powers of Congress cannot be delegated, yet Congress has established the Interstate Commerce Commission which does legislative, judicial, and executive acts, only softened by a *quasi*." ²⁷ In other words, the judiciary has granted permission to the delegation of quasi-legislative, quasi-executive, and quasi-judicial powers, even though in actual practice the person affected does not see much difference. Throughout this Chapter, however, we omit the "quasi," considering it implied or required as warranted. Nevertheless, this concept permits the creation of agencies and the delegating to them of all three types of powers, and these agencies we term tripartite ones.

There are requirements, of course, limiting the ability of either the executive or the legislature to delegate, e. g., standards, or to delegate certain powers (§ 173). For example, can the legislature delegate to an agency, even a public or governmental one, the power to create or define a crime? Or the power to create the punishment, or add to a statutory punishment, for a crime statutorily defined and created? Congress may provide for the punishment of valid administrative regulations, so long as the penalties are found in the statute, and in 1944 an administrative suspension order of a dealer's agency license was upheld where he violated a rationing regulation of the agency, even though this punishment was not explicitly provided for.²⁸ "The discretion left to enforcing officers is not one of defining the offense. It is merely that of matching the measure of the discipline to the specific case." ²⁹

§ 177. — — The Inapplicability of Procedural Due Process of Law

The administrative agency is bound by all constitutional limitations which inhibit its delegator (e. g., § 198, *infra*); in

27. Dissenting in *Springer v. Government of the Philippine Islands* (1928) 277 U.S. 189, 210, 48 S.Ct. 480, 72 L.Ed. 845.

(1944) 322 U.S. 398, 64 S.Ct. 1097, 88 L.Ed. 1350; *United States v. Eaton* (1892) 144 U.S. 677, 12 S.Ct. 764, 36 L.Ed. 591.

28. *United States v. Grimaud* (1911) 220 U.S. 506, 31 S.Ct. 480, 55 L.Ed. 563; *Steuart & Bros. Inc. v. Bowles*

29. *Barsky v. Board of Regents* (1954) 347 U.S. 442, 74 S.Ct. 650, 98 L.Ed. 829.

addition, the delegator by statute or executive order may impose other and additional limitations (§ 182). One of these constitutional (or statutory) limitations is the requirement of procedural due process of law, discussed at greater length in § 181. When does this procedural requirement apply to the delegator? Neither Congress nor the President is ever constitutionally required to give any such procedural due process, i. e., notice and hearing, to any person while their respective functions are being performed. Suppose a delegation of these powers to an agency which can exercise only these two powers and no others—is this agency, when exercising either one of these powers, or both simultaneously, now constitutionally required to give such notice and hearing, even though its delegator is not required to do so? Again the answer is no. But suppose a tripartite agency is involved, that is, an agency delegated legislative, executive and judicial powers—must it give notice and hearing when it acts? As to the first two powers, and when only these are so used, the constitution still does not require notice and hearing by the agency to the person involved or affected;³⁰ as to the third power, § 181 discloses the answer broadly to be yes, and § 178 mentions certain requirements.

§ 178. — The Judicial Process and the Judicial Power—Constitutional and Legislative Courts Distinguished

We have termed a tripartite agency one to which the three powers of government have been delegated. If an “agency” is given judicial power only, and no others, then obviously it must be considered to be a court and must be so treated, even though it deals exclusively with the enforcement or review of administrative agency orders.³¹ But a tripartite agency is not a court, even though it may have judicial powers, and such an agency need not exercise these judicial powers at all; the fact of their possession

30. See, as to “the mere executive duty,” *Buttfield v. Stranahan* (1904) 192 U.S. 470, 496, 24 S.Ct. 349, 48 L.Ed. 525; *Yakus v. United States* (1944) 321 U.S. 414, 424, 425, 64 S.Ct. 660, 88 L.Ed. 834; *State v. Newark Milk Co.* (1935) 118 N.J. Eq. 504, 179 A. 116, 126: “As pointed out, the respondent board merely exercises the administrative function to effectuate the definitely declared legislative policy [to fix milk prices, etc.]. Such regulation is purely a legislative function; and, even when exercised by a subordinate body, upon which it is conferred, the notice of hearing essential in judicial proceedings is not

indispensable to a valid exercise of the power.”

31. E. g., the Mann-Elkins Act of 1910, 33 Stat. 539, created the Commerce Court, abolished in 1913, to exercise exclusive jurisdiction of enforcement orders of the I. C. C.; the Emergency Court of Appeals was created in 1942, 56 Stat. 23, 31–33, as a three-judge court to handle only appeals from O.P.A. orders and with power to set aside orders, remand proceedings, etc. See, on its exclusive jurisdiction vis-a-vis the regular federal district courts, *Lockerty v. Phillips* (1943) 319 U.S. 182, 63 S.Ct. 1019, 87 L.Ed. 1339.

does not imply the fact of their use and application. These bodies, when actually exercising such a judicial power, are not constitutional courts, created by Congress under its powers in Art. I, § 8, cl. 9, and endowed with judicial powers under Art. III, § 1, as defined in § 2, cl. 1; these courts are termed legislative courts. This distinction was discussed by Marshall as early as 1828 when he held a territorial court to be a legislative, and not a constitutional, court.³² And as to matters arising between the federal government and others, "which from their nature do not require judicial determination and yet are susceptible of it," then the "mode of determining" these "is completely within Congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals."³³ In addition, Congress exercises a plenary jurisdiction over the District of Columbia, granted in Art. I, § 8, cl. 17, which enables the federal legislature to act towards this entity's judiciary just as a state legislature acts toward state courts (assuming no state constitutional prohibitions), namely, to control them completely and to use them as judicial or legislative courts or both.³⁴ It is only when an agency is exercising the judicial power within a constitutional field that, provided there be also a degree of touch of finality added, then within the agency proceeding there must be given procedural due process of law. Before analyzing this further, it is first necessary that the judicial power be analyzed and understood to embrace a process, as well as a power; for the process as such is not involved in this constitutional limitation upon agency proceedings.

§ 179. — — The Judicial Process

The judicial process involves merely a method or procedure of fact-gathering, sifting for the true or correct facts, analysis of the facts, drawing inferences from them, and making a final decision, determination, judgment, or order on them, and there is nothing strange or peculiar to the judiciary in this. This method is found in many fields, e. g., the military's "estimate of the situation," the accountant's cost-analysis, the businessman's decision on pricing, production, etc., and, as everyone is aware of today, the procedures preparatory to launching a space vehicle. In these and many other fields the correct or true facts are basic to any subsequent evaluation, and even the courts of law utilize juries to sift, evaluate, and pronounce the true facts; the legal inferences and decisions follow almost automatically. This overall process,

32. *American Insurance Co. v. Canter* (1828) 1 Pet. 511, 546, 7 L.Ed. 242.

33. *Ex parte Bakelite Corp.* (1929) 279 U.S. 438, 451, 49 S.Ct. 411, 73

L.Ed. 789. See also Forkosch, *Administrative*, p. 44 and citations.

34. See Forkosch, *Administrative*, pp. 45-46 and citations; see also the *Jordan* case, *infra* note 43.

when used by and in the judiciary, is here termed the judicial process, and is distinguished from the judicial power.

§ 180. — — The Judicial Power

The judicial power encompasses several aspects. For example, a constitutional court has the inherent power to punish for a contempt,³⁵ and this cannot therefore inhere in a body which is not such a court. But a legislative court has another aspect of the judicial power which it can, if it is so authorized, wield. This particular aspect of the judicial power relates to, or is termed, the finality of fact concept or doctrine. In the preceding section we have said that the judicial process is found in numerous other areas, and that this process involves the ascertainment of the evidentiary facts, sifting them, and obtaining the true or correct facts which can then be evaluated and inferences or conclusions drawn. The C.I.A., for example, has a terrific problem in gathering and sifting facts so as to arrive at a true statement of the facts; and its evaluation, inferences, and conclusions are dependent upon a sound and correct base of true facts else all totters. This gathering and sifting of the evidentiary facts, and then arriving at the true facts, is accomplished by a judge sitting without a jury, or by a jury, or now by the agency; but in any case the trial court's or the agency's determination of the true facts is made final because of its opportunity to see and evaluate the witnesses, their demeanor and the overall impression, see and hear the direct and cross-examinations, i. e., the evidentiary facts as given, and otherwise participate in the trial or the agency hearing.³⁶ And now, if to this procedure we add the next step, that the rational inferences flowing from a substantial basis of such true facts are made final and binding upon any other body, the particular aspect of the judicial power involved can be understood. This overall process involves the substantial evidence rule, that is, that there be a substantiality of (evidentiary and true) facts to support the rational inferences of fact drawn by the agency, and if so correctly and properly made and substantiated, then these inferences or "findings of fact" are made final and binding upon the reviewing court. This is the finality of fact doctrine and, insofar as it precludes the courts from disturbing the agency's base of inferred or conclusory facts, it in effect prevents the

35. *United States v. United Mine Workers of America* (1947) 330 U. S. 258, 67 S.Ct. 677, 91 L.Ed. 884, *I. C. C. v. Brimson* (1894) 154 U.S. 447, 14 S.Ct. 1125, 38 L.Ed. 1047.

36. We have been, to this point, analogizing a judicial court proceed-

ing to an agency proceeding, although a better analogy would be to a court-appointed referee or master in chancery to hear and report back to the court with his findings and recommendations.

courts from disturbing the agency's determination if the proper and correct legal principles have been applied.³⁷

§ 181. — — — The Constitutional Requirement of Procedural Due Process of Law

The constitutional requirement of procedural due process of law, i. e., notice and hearing, is found in the 5th Amendment as a limitation upon the federal government, and in the 14th Amendment as a limitation upon the states (Part C goes into details on this). The Clause states, as we have seen, that any substantive right of life, liberty or property cannot be "taken" (i. e., the government cannot "deprive" one of it) from a person unless he first is given such notice and hearing.³⁸ There is a taking, for our purposes, when nothing further can be done by a person about a destruction or impairment of his substantive right (although under certain conditions he may later sue and receive his procedural rights after the taking); or, put differently, when the action of the judiciary is final. " 'Finality' is also employed in a different [substantive] sense . . . , in reference to judicial action not subject to subsequent revisory executive or legislative action."³⁹ In other words, a final decree or determination involves a taking when this cannot be subsequently revised. A fact-determination by a judge, as to what happened in the past so that a present decree or judgment may be made, is final and binding also. For example, the judiciary adjudicates controversies between parties, and after determining what the facts are which have happened, i. e., it makes findings of past facts, it then applies the applicable principles of law and makes a final determination. This final determination, may, perhaps, be appealed within the judicial sys-

37. We do not proceed further with the ramifications of these concepts, and the exceptions possible, as these generally are based upon statutes. The federal judiciary, within its own borders, uses the "clearly erroneous" principle, *United States v. Chemical Foundation, Inc.* (1926) 272 U.S. 1, 14, 47 S.Ct. 1, 71 L.Ed. 131, citing *Washington Securities Co. v. United States* (1914) 234 U.S. 76, 78, 34 S.Ct. 725, 58 L.Ed. 1220. There is nothing antagonistic in this agency power as against the court's power. "Courts and administrative agencies are not to be regarded as competitors in the task of safeguarding the public interest. . . . Courts no less than administrative bodies are agencies of government. Both are instruments for

realizing public purposes." *Scripps-Howard Radio, Inc. v. F. C. C.* (1942) 316 U.S. 4, 15, 62 S.Ct. 875, 86 L.Ed. 1229.

38. "Due Process requires that the court which assumes to determine the rights of parties shall have jurisdiction, and that there shall be notice and opportunity for hearing given the parties [T]hese two fundamental conditions . . . seem to be universally prescribed in all systems of law established by civilized countries." *Twining v. New Jersey* (1908) 211 U.S. 78, 110-111, 29 S.Ct. 14, 53 L.Ed. 97, citations omitted.

39. *Joint Anti-Fascist Refugee Committee v. McGrath* (1951) 341 U.S. 123, 155, fn. 4, 71 S.Ct. 624, 95 L. Ed. 817, per Frankfurter, J.

tem, but it is still the judiciary; insofar as the other two departments are concerned, there can be no overturning of this final judicial judgment otherwise there is no judicial power. "Judicial power is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision."⁴⁰ Insofar and to the degree that any finding of fact is not able to be determined by the judiciary, then to that degree has the judiciary either surrendered its judicial power (not the case here), or else finds its judicial power exercised by another body. Since the judicial courts are not the only bodies to make fact-determinations, and if the facts as found by some one else cannot be judicially re-determined and are final as to and binding upon the courts, then any person so affected by a body other than a court still has the judicial power exercised against him.

This is the basis upon which the constitutional requirement of procedural due process is applied against the administrative agency which exercises this power of fact-determination, and whose findings of fact are made binding upon the judiciary if and when they review such agency proceedings.⁴¹ For if the judiciary cannot make its own fact-determinations, or substitute its own findings of fact, and is thus bound by those of the agency, then this doctrine of administrative "finality of fact" partakes of the judicial power; and, therefore, to this extent, a "taking" occurs under the constitutional Due Process Clause so that in the agency proceedings where such a finding of fact becomes binding upon the judiciary, procedural due process must be given. In other words, in a constitutional field, procedural due process is required of an agency where it engages in a judicial proceeding from and upon which findings of fact are made which are binding upon the courts.⁴²

§ 182. — Statutory Requirements in Delegations—In General

In the preceding sections we have been discussing the procedural requirements of notice and hearing in a constitutional field where an agency proceeding results in findings of fact which

40. *Muskrat v. United States* (1911) 219 U.S. 346, 356, 31 S.Ct. 250, 55 L.Ed. 246.

41. See also *Lloyd Sabaudo Societa Anonima v. Elting* (1932) 287 U.S. 329, 335, 53 S.Ct. 167, 77 L.Ed. 341, that "due process of law does not require that the courts, rather than administrative officers, be charged, in any case, with determining the facts upon which the imposition of such a fine depends." By statutes and by judicial deci-

sion there is also involved the substantial evidence rule, discussed in § 189, *infra*.

42. Of course the agency must have power and be mandated to grant a hearing, for if it has no statutory authority to hold a hearing then it is acting *ultra vires*, and if it grants a hearing as a matter of discretion or grace the person does not receive his rights as a matter of right.

are binding upon a court. But there are three aspects which must be considered, two of which have already been touched upon. First, if the field is not a constitutional one, then constitutional requirements do not limit the agency's proceedings; second, in a constitutional field there is still no requirement that a tripartite agency itself provide notice and hearing in its proceedings when it is exercising (quasi) legislative or executive, and not judicial, powers; and third, even in a constitutional field where a tripartite agency is now exercising its judicial powers, the judicial review granted by the court or by the basic statute may itself be full and complete, i. e., *de novo*, so that the agency's findings of fact are not binding upon the court.⁴³ In all of these instances the basic statute creating and empowering the agency need not require notice and hearing, for the constitution is not involved either in the field or in the proceeding. By executive order or statute, however, the delegator may require that some type of procedure (or none) be accorded the person involved, i. e., generally called the respondent, even though this may not be equal to those minimums which the judiciary says are required by the constitutional provisions of notice and hearing. In other words, a statute may still grant some procedural rights where the constitutional minimums do not apply, and these statutory rights must be granted to the respondent else the agency is acting *ultra vires*. What these statutory rights are must be found in the law; how they should be interpreted or applied is found in the judicial decisions. Since these latter are based upon the background, purpose, etc. of the individual statute, and judicial canons of interpretation may or may not apply, each statute must be examined separately.⁴⁴

43. As to the court's grant of a *de novo* review, see e. g., § 198, *infra*, as to the statute's grant of such review, see, e. g., *Jordan v. American Eagle Fire Ins. Co.* (1948) 83 U. S.App.D.C. 192, 169 F.2d 281. See also § 185, *infra*.

44. E. g., in the armed forces "the military law is due process. . . . The courts have no power to review. The courts are not the only instrumentalities of the government. They cannot command or regulate the Army." *Reaves v. Ainsworth* (1911) 219 U.S. 296, 304, 306, 37 S.Ct. 230, 55 L.Ed. 225. In civil service, until 1956, the President was not bound by the Consti-

tution, statute, or civil service rules and regulations in disciplining employees, e. g., *United States ex rel. Taylor v. Taft* (1906) 203 U.S. 461, 464, 27 S.Ct. 148, 51 L.Ed. 269 (an exception is found in *Roth v. Brownell* [1954] 94 U.S.App.D.C. 318, 215 F.2d 500, 502, cert. den. [1954] 348 U.S. 863, 75 S.Ct. 88, 99 L.Ed. 680. The "loyalty" executive orders permitted only procedure to be examined by the courts, not whether in fact the respondent was disloyal, i. e., on the merits. *Friedman v. Schwellenbach* (1946) 81 U. S.App.D.C. 365, 159 F.2d 22, 25, cert. den. (1947) 330 U.S. 838, 67 S. Ct. 979, 91 L.Ed. 1285.

§ 183. — — Procedural Due Process of Law

The statutory rights which may be granted in the three aspects of administrative proceedings just considered are, in effect, gifts to the respondent and cannot be enlarged by him, the courts, or even by the agency, for then it acts *ultra vires*. But there is no reason why the delegator can grant only procedural rights which are less than the constitutional minimums discussed; in other words, the delegator may grant no procedural rights,⁴⁵ some procedural rights which are less than the constitutional minimums, procedural rights which equate with the constitutional minimums, or even procedural rights which go beyond and are superior to the minimums required by due process. Each statute must be considered in the light of its own background, and within the terms of its own language.⁴⁶ For example, in the famous *Morgan* case, Chief Justice Hughes wrote: "Nor is it necessary to go beyond the terms of the statute in order to consider the constitutional requirements of due process as to notice and hearing. For the statute itself demands a full hearing and the [Secretary's] order is void if such a hearing was denied."⁴⁷ While legislative action and a legislative order gave the administrative proceedings a "distinctive character, . . . it is a proceeding which by virtue of the authority conferred has special attributes." These latter required a hearing which "has obvious reference [i. e., the Congressional intent] to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. . . . It is a duty akin to that of a judge." Thus a full hearing required by statute, in the absence of any limitation, is to be equated with the judicial type of hearing required under the due process clause, and the denial of such a statutory hearing is not a constitutional violation but is an *ultra vires* act on the part of the agency which acts without the scope of its mandate and thereby limits a person's (statutorily acquired) rights. By judicial interpretation the Supreme Court has accorded the statutory adjectives "fair" or "full" a meaning which requires an administrative procedure which equates with the constitutional minimums of procedural due process; it has even gone so far as to hold that, under conditions where the intent can be inferred, the mere statutory requirement of a "hearing" likewise imports such a full or fair one.

45. See, e. g., discussion in *Lynch v. United States* (1934) 292 U.S. 571, 587, 54 S.Ct. 840, 78 L.Ed. 1434, and 54 Stat. 1197, 38 U.S.C.A. § 11a-2; see discussion and citations in Forkosch, *Administrative*, pp. 55-60.

46. Where the Congressional intent is clear then judicial construction

or interpretation is not required. *Unexcelled Chemical Corp. v. United States* (1953) 345 U.S. 59, 73 S.Ct. 580, 97 L.Ed. 821.

47. *Morgan v. United States* (1936) 298 U.S. 468, 477, 479, 481, 56 S.Ct. 906, 80 L.Ed. 1288.

§ 184. The Administrative Process—Preliminary

The administrative process is a proceeding utilized by agencies for many purposes, e. g., investigating, rule-making, i. e., legislating, licensing, regulating, determining. "It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other."⁴⁸ We are here concerned only with the applicability of the constitutional requirements of procedural due process to any one or more of these investigating, rule-making, etc. aspects of the process, for even in its investigations the agency may so change into a quasi-judicial proceeding as to have constitutional rights apply. It is not the entirety of the administrative process to which such notice and hearing requirements therefore attach, but no aspect of the process can be ignored. We assume that in any one of its proceedings the agency's quasi-judicial power is being applied, and that procedural due process is therefore required in the light of the preceding analysis. And, because a statutorily-required hearing may equate with these constitutional minimums, what is said about the latter holds for the former.

§ 185. — Applicability of Procedural Due Process Requirements—In General

Although an administrative proceeding does not equate with a judicial proceeding, the early cases made no great distinction insofar as procedural due process was concerned. "We must not disguise the fact that sometimes, especially early in the history of the federal administrative tribunal, the courts were persuaded to engraft judicial limitations upon the administrative process," wrote the late Justice Jackson, but "More recent views have been more tolerant of it than those which underlay many older decisions."⁴⁹ Just what is meant by procedural due process, and how is it applied? There are, to adopt the 1884 language of Justice Field, six elements to be found within the term, namely, "that by 'due process' is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected.

48. *United States v. Morgan* (1941) 313 U.S. 409, 422, 621 S.Ct. 999, 85 L. Ed. 1429.

49. *United States v. Morton Salt Co.* (1950) 338 U.S. 632, 642, 70 S. Ct. 375, 94 L.Ed. 401. See also *F. C. C. v. Pottsville Broadcasting Co.* (1940) 309 U.S. 134, 142-143, 60 S. Ct. 437, 84 L.Ed. 656: "Administrative agencies have power them-

selves to initiate inquiry, or, when their authority is invoked, to control the range of investigation.

. . . These differences in origin and function preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts."

It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought.”⁵⁰ Although the elements may be quantitatively specific, they are qualitatively ambiguous, for just what is meant by each of them? While the answer defies particularized definition, we may illustrate the two overall requirements of notice and hearing in the next five sections.

§ 186. — — In Particular—Notice

Notice is always a requisite of hearing, and procedural due process necessitates notice of a subsequent hearing.⁵¹ This notice must be “adequate,” that is, it must contain certain items, be properly served, upon the parties, and give a reasonable opportunity to prepare for a hearing.⁵² The “notice of hearing” is usually in the form of a legalistic summons or rule to show cause, although due process does not mandate a particular form; it must, however, contain the charges upon which the respondent will be heard, otherwise he is not apprised sufficiently so as to meet them. Charges in the form of the statutory language have been upheld,⁵³ although the basic statute or another one may require greater specificity,⁵⁴ and where they are completely lacking it may be held jurisdictionally void.⁵⁵ Service of the notice may, constitutionally if not statutorily, be in almost any manner which, under the circumstances and requirements of the case, and for the relief desired, is reasonably certain to get to the attention of the respondent, e. g., even substituted service, by mail or telegram, or by publication.⁵⁶ The time between the service and hearing, within which the respondent will be held to have had a reasonable opportunity to prepare, varies, e. g., an administrative hearing on a license revocation of a peddler’s license may be just as im-

50. *Hagar v. Reclamation Dist. No. 108* (1884) 111 U.S. 701, 798, 4 S. Ct. 663, 28 L.Ed. 569. See also *Weimer v. Bunburry* (1874) 30 Mich. 201, 211–213, *Uveges v. Pennsylvania* (1948) 335 U.S. 437, 69 S. Ct. 184, 93 L.Ed. 127.

51. See, e. g., *Roller v. Holly* (1900) 176 U.S. 398, 20 S.Ct. 410, 44 L.Ed. 520, *Snyder v. Massachusetts* (1934) 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674.

52. E. g., *Cooke v. United States* (1925) 267 U.S. 517, 537, 45 S.Ct. 390, 69 L.Ed. 767 (a criminal case): “Due process of law, therefore . . . requires that the accused

should be advised of the charges and have a reasonable opportunity to meet them by way of defense of explanation.”

53. *A. E. Staley Mfg. Co. v. F. T. C.* (7th Cir. 1943) 135 F.2d 453, 454.

54. E. g., *Petition of Village Board of Wheatland (Northern Pacific Ry. Co. v. McDonald)* (1950) 77 N. D. 194, 42 N.W.2d 321, 331.

55. See, e. g., *Abrams v. Daugherty* (1922) 60 Cal.App. 297, 212 P. 942. This case is not too well received and should be limited.

56. See *Forkosch, Administrative*, pp. 248–261 and citations.

portant as the revocation of a carrier's or a broadcaster's license, and yet the amount of required preparation is certainly not the same.⁵⁷

§ 187. — — — Hearing—Before

An administrative hearing is not a judicial trial. While both are constitutionally required to be "fair", the judicial definition of this term is different for each proceeding, and, as to the administrative one, may vary under different situations. "'Hearing' is a term of art in administrative proceedings,"⁵⁸ so that the judiciary's definition or interpretation becomes important. By a hearing is included not alone the so-called trial, at which witnesses are sworn and testimony is taken, but all proceedings beginning with the service of the notice up to and including the final agency order. By analogy, a court's judicial proceeding begins with the service of the summons (exceptions aside) and continues up to and including the judgment or decree (appeals and enforcement aside); the actual trial is but one phase of this judicial proceeding. So in an administrative proceeding, for the hearing there does not equate with the trial or court hearing in a judicial proceeding. Since "hearing" is a term of art in administrative law, it must be examined somewhat more carefully than notice; and so we use the actual gathering of testimony (the "trial") as the point from which to discuss the quasi-judicial proceeding in an administrative agency before, during, and after, and lastly, analyze the agency's order.⁵⁹ The constitutional requirements of a fair hearing do not, prior to the actual gathering of testimony in the administrative quasi-judicial proceeding, necessitate that pre-trial examinations, bills of particulars, motions, etc. follow the same or analogous pattern of a judicial proceeding. Agencies vary in their procedures, and sometimes considerably. Since the standard is a reasonable knowledge and understanding of the charges and a reasonable opportunity to prepare for the trial, much that may be granted by one agency may be refused by another. There is, however, a constitutional right to counsel in all phases of this agency proceeding, from beginning to end, and a right to produce evidence through the testimony of others, i. e., to subpoena witnesses and documents, but not to an unreasonable degree; the agency issues these subpoenas upon application

57. A 5-day notice is not per se constitutionally unfair. *Eastern Utilities Associates v. S. E. C.* (1st Cir. 1947) 162 F.2d 385. Other aspects of notice, service, etc. are discussed in Chapter XIX.

58. *Feeney v. Willard* (S.D.N.Y. 1955) 129 F.Supp. 414, 417.

59. This is the approach in Forkosch, *Administrative*, Chaps. XIII, XIV, and XV, discuss each one of these four aspects. What follows in this, and the succeeding sections, is based upon the analyses there.

and passes upon these questions at that time, subject to subsequent court review of reasonableness.

§ 188. — — — — During

During an agency trial (or hearing in the restricted sense of the term) there is no right to a jury or to a courtroom with all of the trappings one finds in the judicial system. While a respondent is entitled to a degree of dignity and decorum, informality as a rule prevails.⁶⁰ Although procedural due process does not require that the hearing or trial examiner who gathers the evidence also be the one who sifts, evaluates, and then decides,⁶¹ it does require that the trial hearing be conducted by "an unbiased and non-partisan trier of the facts,"⁶² not one who is "guilty of threatening, badgering, and arguing with witnesses, making statements during the hearing contradictory of the true facts, cutting short cross-examination, and acting more in the role of a prosecutor than impartial examiner."⁶³ The fourth Morgan case, however, upheld the right of an administrator to sit even though he had written a letter to a paper in which he severely criticized the Supreme Court's decision in a prior appeal, and where he felt the Secretary had a right "to have an underlying philosophy in approaching a specific case."⁶⁴ A respondent has a procedural right to cross-examine witnesses, to present his own testimony and also that of witnesses on his behalf, but on the question whether all such testimony must constitutionally be under oath, there is respectable authority on both sides; the general and usual practice is for sworn testimony.⁶⁵ Insofar as the actual testimony

60. Thus the participants may smoke or hold the hearing around a table, although the I. C. C.'s "hearings are probably unusually dignified and formal." Attorney General's Committee on Administrative Procedure, 77th Cong., 1st Sess., Se.Doc. #10 (1941) pt. 11, p. 14.

61. *N. L. R. B. v. Stocker Mfg. Co.* (3d Cir. 1950) 185 F.2d 451, 453, 454, although see citations and discussion in Forkosch, Administrative, pp. 318-319, and footnotes, for some decisions to the contrary.

62. *N. L. R. B. v. Phelps* (5th Cir. 1943) 136 F.2d 562, 563.

63. *N. L. R. B. v. Washington Dehydrated Food Co.* (9th Cir. 1941) 118 F.2d 980, 986.

64. *United States v. Morgan* (1941) 313 U.S. 409, 421, 61 S.Ct. 999, 85 L.Ed. 1429. For other illustrations see Forkosch, Administrative,

pp. 324-325; as to the rule of the "doctrine of necessity," where bias is permitted, see pp. 326-328.

65. For discussion and citations, see *ibid.*, at pp. 332-334, and see further p. 342, fn. 20-21. One of the problems much discussed and litigated in the 1950's involved the right of confrontation, i. e., that witnesses should be available for cross-examination and not be "faceless informers" whose names were never known to the defendants. In 1959 five Justices struck down the government's security program covering employees of defense contractors, holding that neither Congress nor the President had authorized procedures in which the right to confront and cross-examine accusers was denied. While not deciding the constitutionality of such a program if this right had actually been denied, Chief Justice Warren's opinion used such

is concerned, there is no constitutional right that the evidence be restricted solely to that given in a court of law, so that admissibility is not affected by the hearsay rule; the weight of the evidence may be involved, but not its admissibility. In general, the scope of the evidence admitted in a quasi-judicial administrative hearing is even broader and greater than that which a federal district court would admit when sitting as a court of equity or in admiralty. So long as there is "substantial evidence" as discussed in the next section, constitutional requirements are met and questions of admissibility are not of great moment.

§ 189. — — — — After

At the conclusion of the actual taking of testimony, and whether immediately or subsequently, the respondent must be able to present arguments, written or oral as permitted, but not to an unreasonable length. The argument may be upon the facts, the law, or both, and may seek to analyze the facts, evaluate them, and suggest inferences, etc. It is at this point that the "substantial evidence rule" enters. The person who decides must now examine all of the evidentiary facts, ascertain the true or primary ones, and then draw inferences or make findings of fact based upon them. Since it is these findings which, if supported by substantial evidence upon the whole record, are binding upon the reviewing court, and since this finality of fact partakes of the judicial power, it is of extreme importance that this be properly done⁶⁶. The concept of substantiality stems from the reasonable businessman's approach to making price, cost, and other determinations in his affairs,⁶⁷ but this does not mean that any conclusion of fact is permitted. There must "be a rational connection between the facts proved and the fact" inferred, and there is none "if the inference of one from proof of the other is arbitrary because of lack of connection between the two in common

language strongly suggesting that the Constitution required some confrontation in security proceedings. *Greene v. McElroy* (1959) 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377. On April 27, 1962, the Atomic Energy Commission became the first federal agency which granted confrontation and cross-examination to its employees and job applicants. *N. Y. Times*, May 1, 1962, p. 1, col. 6.

66. Most basic statutes contain a phrase or clause to the effect that "The findings of the commission as to the facts, if supported by substantial evidence [on the whole record] shall be conclusive." See, e. g., *Social Security Board v. Nie-*

rotko (1946) 327 U.S. 358, 368, 66 S.Ct. 637, 90 L.Ed. 718. Unless the basic statute provides for such conclusiveness then no question will ordinarily arise as to the power of the court.

67. See analyses in *Consolidated Edison Co. v. N. L. R. B.* (1938) 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126, *Universal Camera Corp. v. N. L. R. B.* (1951) 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456, and *Stork Restaurant, Inc. v. Boland* (1940) 282 N.Y. 256, 26 N.E.2d 247; see also *Foote Bros. Gear & Machine Corp. v. N. L. R. B.* (7th Cir. 1940) 114 F.2d 611, 621 and lengthy analysis in *Forkosch, Administrative*, Chap XIV.

experience.”⁶⁸ The procedural requirements of due process necessitate this rational connection, but when it is found, and there is a firm substantiality of evidence, the findings of fact are, under the appropriate statute, binding upon the court.⁶⁹ When the trier has concluded this substantial evidence analysis, and made his findings, he or it can, if it is the agency which is now the one so acting throughout or in the post-trial state,⁷⁰ promulgate its decision and order without more. If, however, a trial examiner is the one so to analyze, etc., then he can make no determination; he must report to the agency through what is called an “intermediate report.”⁷¹ In this intermediate report he sets forth the jurisdictional bases, the agency background, generally a digest of the testimony or incorporates this with his analysis of the facts, analyzes the witnesses and their demeanor, differences, etc., and then chooses the testimony he credits as the base upon which he makes “proposed” or “recommended” findings of fact and conclusions of law, together with a proposed order. This intermediate report is ordinarily a procedural requirement of due process and its absence “is a vital defect.”⁷² This intermediate

68. *Tot v. United States* (1943) 319 U.S. 463, 467, 468, 63 S.Ct. 1241, 87 L.Ed. 1519 (the quotations are out of context); see also *Adler v. Board of Education* (1952) 342 U.S. 485, 494, 72 S.Ct. 380, 96 L.Ed. 517.

69. On the “whole record” rule, see Forkosch, *Administrative*, § 257. If a choice of findings is available, and these are all supported by substantial evidence, then the choice is for the agency and the courts cannot interfere.

70. A trial examiner may begin a proceeding and then, during its progress, be replaced by the agency; at the conclusion of the trial hearing he may likewise be so replaced; while he is sifting the evidence he may be replaced; at any time up to the promulgation of the intermediate report he may be changed or replaced by the agency itself. The agency, at any such stage, may itself take over and continue the proceeding. When it does, and assuming the other procedural requirements have been met, e. g., argument, no intermediate report is required. *N. L. R. B. v. Mackay Radio & Telegraph Co.* (1938) 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381.

71. Or, under § 8(a) of the Administrative Procedure Act of 1946, 60

Stat. 237, 5 U.S.C.A. § 1001, an “initial decision” may be made, although when this is the case certain of the procedures we discuss from a constitutional point of view are not involved. This A. P. A. is not otherwise mentioned in this analysis though, in the federal jurisdiction, it is of great statutory importance.

72. *Morgan v. United States* (1937) 304 U.S. 1, 22, 58 S.Ct. 773, 82 L. Ed. 1129, although see *Public Service Corp. (N.J.) v. S. E. C.* (3d Cir. 1942) 129 F.2d 899, 904, cert. den. (1942) 317 U.S. 691, 63 S.Ct. 266, 87 L.Ed. 553. The quotation is in the following context: The agency or (there) the Secretary of Agriculture “might himself hear the evidence and the contentions of both parties and make his findings upon the spot. Again, the evidence being in, the Secretary might receive the proposed findings of both parties, each being notified of the proposals of the other, hear argument thereon and make his own findings. But what would not be essential to the adequacy of the hearing if the Secretary himself makes the findings is not a criterion for a case in which the Secretary accepts and makes as his own the findings which have been prepared by the active prosecutors for

report must be served upon (or at the very least made conveniently available to) the respondent or his attorney, who is then given an opportunity to object to it in particular, make counter-proposals, and otherwise present his views to the agency before it decides what to do.

§ 190. — — — The Agency Order

We have seen that the findings of fact must be rationally drawn from the true facts which the trier has accepted after sifting, etc. the evidentiary facts. The concept of rationality is likewise utilized in the agency's order. The determination or conclusion of law by the agency follows the principles of law found either in the applicable judicial decisions or the statutes,⁷³ and in this area the courts will make the final determination. Assuming correct legal principles applied, then the order of the agency will be promulgated. Each decretal paragraph or portion of this order must be rationally connected to and flow from the findings and thus the evidence, and they must also be within the authority granted to the agency to effectuate the policies of the statute, should be remedial and not punitive, specific and not general, and within the agency's *expertise*.⁷⁴

§ 191. Judicial Review—In General

The concept of procedural due process, as we have seen, gives to every person the constitutional right to notice and hearing before his life, liberty or property is taken. To this point we have assumed that the agency, in its proceedings, is "taking" because its findings of fact are binding upon the judiciary when reviewed. Regardless of this finality, and even if it is or is not present, a person is entitled only to one fair hearing (adequate notice is assumed) at some point before a final taking.⁷⁵ Thus

the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them. That is more than an irregularity in practice; it is a vital defect."

73. See, however, *S. E. C. v. Cheney Corp.* (1943) 318 U.S. 80, 63 S. Ct. 454, 87 L.Ed. 626, and also (1947) 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995, where the Supreme Court permitted and even required the agency, under the particular statute and in the absence of law in this field, to formulate its own guiding principles.

74. *Republic Steel Corp. v. N. L. R. B.* (1940) 311 U.S. 7, 11, 61 S.Ct. 77,

85 L.Ed. 6; *N. L. R. B. v. Crompton-Highland Mills, Inc.* (1949) 337 U.S. 217, 220, 69 S.Ct. 960, 93 L.Ed. 1320; *N. L. R. B. v. Cheney California Lumber Co.* (1946) 327 U.S. 385, 388, 66 S.Ct. 553, 90 L.Ed. 739; *N. L. R. B. v. Seven-Up Bottling Co. of Miami, Inc.* (1953) 344 U.S. 344, 348, 73 S.Ct. 287, 97 L.Ed. 377; *N. L. R. B. v. Express Publishing Co.* (1941) 312 U.S. 426, 433, 61 S. Ct. 693, 85 L.Ed. 930; see also Forkosch, ed., *Proceedings of 2d Regional Advisory Conference on Administration*, 12 Lab.L.J. 760, at p. 771 (1961), where the order phase of the agency is analyzed and discussed in extenso.

75. "The demands of due process do not require a hearing, at the ini-

there may or may not be an agency proceeding in the entirety of the taking procedure; there may be only a court or judicial action or proceeding involved. Obviously this type of proceeding is certainly in accord with procedural due process. If an agency proceeding now intervenes the present question is whether, under the circumstances and conditions we examine, procedural due process is given therein. We are not here concerned with substantive rights (see §§ 196–199, *infra*), so that if all of the required procedural rights are obtained either in the agency, or in the courts on review, or in a combination of both, then no procedural violation has occurred. Under these circumstances there is “no doubt that if Congress chose to withdraw all court review from the Commission’s orders it would be constitutionally free to do so,”⁷⁶ assuming no other constitutional argument is able to be raised. An appeal is not “a necessary element of due process of law,”⁷⁷ and neither is a review of an agency’s determination on the assumption that all procedural rights have been given and no substantive question is raised. But this question, whether the agency has actually and legally given a person all of his procedural rights can itself never be answered finally and decisively by the delegator or by the agency; the courts must therefore always be able to permit judicial review of agency proceedings for this, if for no other, reviewing purpose. This limited aspect of judicial review is itself a part of the procedures which comport with due process, for since this is a constitutional right to be upheld and enforced by the courts, they cannot abdicate this procedural review function.

§ 192. — Statutory Limitations

Can a statute reduce this right of a limited procedural judicial review? As we have seen, in non-constitutional fields, yes, although a statutory grant of review is there possible. However, such a statute which makes agency action final and non-reviewable is examined carefully and limited strictly. But suppose in a constitutional field, and in an agency proceeding examined to this point, a statute makes such agency determination either final and non-reviewable, or else reviewable only through certain judicial methods or procedural writs or actions (see § 193); is this a violation of procedural due process? In the first situation the stat-

tial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective.” *Opp Cotton Mills, Inc. v. Administrator* (1941) 312 U.S. 126, 152–153, 61 S.Ct. 524, 85 L.Ed. 624.

76. *R. C. A., Inc. v. United States* (1951) 341 U.S. 421, 423, 71 S.Ct. 806, 95 L.Ed. 1062.

77. *McKane v. Durston* (1894) 153 U.S. 684, 687, 14 S.Ct. 913, 38 L.Ed. 867.

ute is unconstitutional if it thereby prevents the judiciary from examining a person's claim that he has been deprived of procedural due process. The reason is simple; it is the Constitution which grants this procedural right, and no Congressional or agency statute or proceeding can deny it, or prevent the judiciary from examining to see whether it has been denied. For otherwise the Congress may simply and easily deprive a person of his constitutional rights by preventing judicial review.⁷⁸

§ 193. — — Constitutional Requirements

In the second situation envisaged in § 192, *supra*, a statute requires a person to seek or obtain judicial review from an agency proceeding through only one method or type of writ or action; or, perhaps, while permitting any type of judicial writ or action to be used, the statute limits the scope thereof, that is, the breadth of the review accorded. In either case the statute is not violative of procedural due process if, and only if, a person makes no substantial claim that such a limitation upon method or scope prevents him from obtaining the review or the relief to which he is constitutionally or otherwise entitled. But if the judiciary's power to review, or its scope of review, or its power to grant the aggrieved person the relief to which he may constitutionally be entitled, is diminished or eliminated, then it may be claimed that the statute unconstitutionally deprives such a person of his constitutional rights under procedural due process.

§ 194. Limitations—In General

There are many limitations upon the administrative process, and to this point we have examined the procedural one required by the Due Process Clause under certain conditions. While procedural due process has been stressed, it has also been suggested that other limitations may be found, and which may be urged by any person so entitled. These other limitations may be considered as statutory and constitutional ones, and questions of law, or of mixed fact and law, are involved for the judiciary to pass upon.⁷⁹

78. See, e. g., *Plymouth Coal Co. v. Pennsylvania* (1914) 232 U.S. 531, 547, 34 S.Ct. 359, 58 L.Ed. 713; *Yick Wo v. Hopkins* (1886) 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220. In *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.* (1948) 333 U.S. 103, 117–118, 68 S.Ct. 431, 92 L.Ed. 568, a 5–4 decision, the President's determination, based upon a C.A.B. order, was

held to be a discretionary act within his executive competence and hence not judicially reviewable.

79. *I. C. C. v. Union Pacific R. Co.* (1912) 222 U.S. 547, 32 S.Ct. 108, 56 L.Ed. 308; see also *F. R. C. v. Nelson Bros. Bond & Mtge. Co.* (1933) 289 U.S. 266, 276, 53 S.Ct. 627, 77 L.Ed. 1166.

§ 195. — In Particular—Statutory

Statutory limitations upon the administrative process and agencies, insofar as these limitations affect jurisdiction, power, conduct toward persons, ability to hear and determine, make orders, and otherwise act, have been already discussed; so, too, have the statutory limitations upon judicial review. For constitutional purposes the substantial evidence rule, with its corollary finality of fact doctrine, enables procedural due process to be a limitation upon the agency process involving fact-determination. There are statutory limitations which, however, go beyond the constitutionally required procedural minimums, and also grant substantive rights, but these are peculiar to the special law involved and cannot be generalized.

§ 196. — — Constitutional—Illustrations

Besides containing the procedural due process clause and rights, the Constitution contains numerous other clauses which either limit the President and Congress, and thereby also their delegates, or else confer rights upon persons which must be respected by the others. For example, a state cannot delegate the power to an agency to coin money; nor can the federal government delegate the power to declare war. These limitations strike at the delegator and the existence of a power in it, or its inability to delegate a power which it has. Both of these aspects of constitutional limitations (other than procedural due process) are to be discussed in the next three sections, and all are to be examined from the point of view that even if procedural due process is not required, or if required it has been complied with, still the agency determination may be reviewed. There is, however, one important and great difference between the review accorded under procedural due process and that under the other constitutional limitations here examined. Under the limited (as we have seen) review accorded from the usual and normal agency quasi-judicial proceeding, the finality of fact doctrine is binding upon the courts so that agency findings of fact, if supported by substantive evidence, are not to be disturbed by the judiciary. Now, however, and assuming complete agency procedural due process has been had in a constitutional field, still, on review, the courts are not so procedurally bound and may grant a *de novo* review, that is, as if they were hearing the matter for the first time from the very beginning.

§ 197. — — — — Jurisdictional Fact

When a statute conditions the emergence of power upon a future event we may term it a conditional delegation, e. g., in the event of war the President has power to do many things; so, too, where an agency is given power to fix the reasonable rates provided it first finds the existing ones to be unreasonable. In this

latter situation the agency has the power to act before it has to make any findings of fact of unreasonableness; in the former situation, the President can't act until he first makes a finding that war has begun or been declared. Regardless, both of these are statutorily required facts, before the delegatee may exercise jurisdiction for the particular grant involved, and in § 198, *infra*, Brandeis utilizes a constitutional clause to term the agency action "a denial of an essential jurisdictional fact." But the concept here involved, namely, of an agency finding of fact which is dignified to a constitutional level so as to require a *de novo* trial on judicial review, is rare and limited. For example, *Crowell v. Benson* has been termed an aberration in constitutional law, and yet it has not been overruled, although limited strictly to its facts. There a federal workman's compensation was involved, and the employer claimed the agency had granted an award upon two erroneous findings of fact, namely, that the relationship of employer and employee existed, and that the injury occurred on navigable waters. The majority conceded finality to the usual findings of fact but "A different question is presented where the determinations of fact are fundamental or 'jurisdictional,' in the sense that their existence is a condition precedent to the operation of the statutory scheme."⁸⁰

§ 198. — — — — Citizenship

Under the 14th Amendment's § 1 a federal citizen is defined as one who is born within the United States and is subject to its jurisdiction, or is naturalized, and "To deport one who so claims to be a citizen obviously deprives him of liberty It may result also in loss of both property and life; or of all that makes life worth living."⁸¹ "The precise question," said Brandeis for the unanimous Court, is whether a claim of citizenship by the deportee, supported before the agency and in the petition for habeas corpus, entitles him to a *de novo* judicial trial. The answer was yes, because "Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact."⁸²

80. (1932) 285 U.S. 22, 37, 52 S.Ct. 285, 76 L.Ed. 598, a 5-3 decision, Cardozo not replacing Holmes until a month later.

81. *Ng Fung Ho v. White* (1922) 259 U.S. 276, 284, 42 S.Ct. 492, 66 L.Ed. 938.

82. *Ibid.*, at pp. 283, 284. In an immigration case, where the alien is excluded as he seeks to enter (a deportation case is one in which he has entered, legally, or illegally, and is sought to be sent out), there is no constitutional right in-

involved and the administration determination may be made final. *United States v. Ju Toy* (1905) 198 U.S. 253, 25 S.Ct. 644, 49 L.Ed. 1040. In general, see also *Kessler v. Strecker* (1939) 307 U.S. 22, 59 S.Ct. 694, 83 L.Ed. 1082, and *Avina v. Brownell* (S.D.Tex.1953) 112 F. Supp. 15. The Immigration & Nationality Act of 1952, § 360, is declaratory of the *Ng Fung Ho* and *Ju Toy* decisions. Brandeis also wrote that "the proceeding is, throughout, executive in its nature." P. 284.

§ 199. — — — — Substantive Due Process of Law

In general and broadly put, the substantive due process clause prevents confiscation by an agency in a rate case, i. e., where the return is so low that invested capital is impaired or cannot be maintained, or is otherwise diminished, or the granting of a rate by an agency which is not confiscatory, but is yet so low as not to afford a fair return on the invested capital. Since the actual return is based upon the capital as valued by one or another method, multiplied by the interest rate as determined by one or another method, the utilities involved are usually desirous of obtaining a high valuation or rate or both so as to increase their returns; and the rate permitted by the agency to be charged by the utility is then fixed so as to realize this return. In the *Ben Avon* case, in 1920, the state's agency valued the company's property at \$924,744.00, whereas the state's intermediate court fixed it at \$1,324,621.80; the state's supreme court reversed because it felt precluded by the basic statute from making an independent examination of the facts, and that "there was competent [substantial] evidence to sustain the Commission's conclusion, and no abuse of discretion appeared," but the Supreme Court felt this was error. For, wrote the majority, "if the owner claims confiscation of his property will result [by too low a valuation and the resulting small or no return on his property], the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, 14th [substantive]." ⁸³ In other words, a *de novo* review was accorded to a utility which disagreed with an agency's rate making substantive determinations. In 1936 and 1947 this view was reaffirmed, but now the court held that a *de novo* review would not automatically be granted. First the utility had to overcome certain judicial hurdles, and then it could obtain such a *de novo* review; ⁸⁴ the substantive *de novo* review concept therefore remains, but limited by such preliminary requirements or conditions precedent, and eventually returned to the agency if facts are to be presented not found in the record.

83. *Ohio Valley Water Co. v. Ben Avon Borough* (1920) 253 U.S. 287, 288, 289, 30 S.Ct. 527, 64 L.Ed. 908. Brandeis dissented, with Holmes and Clarke concurring, and this minority felt that while there should be judicial review its scope should not extend beyond the limited one accorded by the substantial evidence rule.

84. *St. Joseph's Stock Yards Co. v. United States* (1936) 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033, and *New York v. United States* (1947) 331 U.S. 284, 67 S.Ct. 1207, 91 L.

Ed. 1492. The limitations are: the strong presumption in favor of the agency's conclusions; a clear case must be made to overcome the findings of fact; the utility must overturn the presumption of validity; any new evidence must first be presented to the agency for its additional consideration; and even so, if the total rate order is not shown "to be unjust and unreasonable, judicial inquiry under the Act is at an end." *F. P. C. v. Hope Natural Gas Co.* (1944) 320 U.S. 591, 602, 64 S.Ct. 281, 88 L.Ed. 333.

Chapter X

THE FEDERAL COMMERCE POWER

§ 205. The Commerce Clause—In General

In the powers granted to Congress there is one, here examined, which is, excluding the war power, undoubtedly one of the greatest of those federally exercised. Its scope and depth have not yet been completely defined, and if ever a single peacetime power will change our dual-sovereign system into a unitary one, it may well be this. Its importance is attested by every jurist, writer, and government official, and the expanding administrative domain is generally keyed to this Clause. The Commerce Clause cannot be examined to the extent it deserves, but sufficient detail will be given for an appreciation of its powers.

§ 206. — In Particular—Interstate Commerce to be Examined

"The Congress shall have Power To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes;" so reads the Commerce Clause in its entirety in Art. I, § 8, cl. 3. There are other Clauses in the Constitution which either bear upon, affect, or limit the federal or state powers, and these state: "No Tax or Duty shall be laid on Articles exported from any State." Art. I, § 9, cl. 5. "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another," cl. 6. "No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws . . . and all such Laws shall be subject to the Revision and Controul of the Congress." Art. I, § 10, cl. 2. "No State shall, without the Consent of Congress, lay any Duty of Tonnage" cl. 3.

We concentrate upon the Commerce Clause alone, the other Clauses entering the discussion as required. In this Clause there are three areas of commerce which are granted to Congress, namely, (1) with foreign nations, (2) among the several states, and (3) with the Indian tribes.

As to the third, we ignore this, because it is of no practical value; as to the first, we spend time upon it indirectly, not directly; it is with the second, called interstate commerce, that we are concerned, although we must first compare it with a fourth type of commerce.

§ 207. — — — Distinguished from Intrastate Commerce

The Commerce Clause mentions only three types of commerce, but there is a fourth, called intrastate commerce, with which interstate commerce must be compared, contrasted, discussed, and made the basis for our approach in this Chapter. For our purposes we initially assume that intrastate commerce is that commerce which is wholly within the borders of a state, does not originate from without, and does not leave the state. "The authority of the Federal government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce."¹ We shall see, however, that interstate may become intrastate, or that intrastate may become, or be treated as if it were, interstate, so that our initial assumption will not stand up. Besides intrastate commerce there is a mass of undefined and undetermined subjects upon which a state may act, e. g., "contracts, the transmission of estates, real and personal, and . . . upon all internal matters which relate to its moral and political welfare. Over these subjects the federal government has no power."²

§ 208. Scope of the Commerce Clause—Views as to Exclusiveness—Text Writers

As set forth in § 206, is the grant to the federal government of a power over "Commerce . . . among the several States" one that is exclusive to it and cannot be shared by the states? Or is it one which is concurrent (see § 96), i. e., upon which both jurisdictions may act until the federal government ousts the state? Put differently, can we really break "Commerce . . . among the several States" into inter and intra, as § 207 proposed? Or is the grant to Congress complete and full, encompassing any and all commerce (as this term is itself defined)? According to Professor Farrand, there should be no such inter-intra distinction. The evils under the Articles of Confederation, heretofore discussed at length, do not permit this, he feels, and the Founding Fathers drew none. "In the matter of trade," he writes of the Constitutional Convention, "a uniform policy was necessary, and that uniformity could only be obtained by granting to the central government full power over trade and commerce, both foreign and domestic."³ Professor Crosskey's exhaustive analysis of the Commerce Clause leads him to feel that the Supreme Court's distinction between inter and intra is "not really warranted . . . For the Commerce Clause, as a mere matter of phraseology, does not express the interstate limitation; the historical background

1. *United States v. Rock Royal Co-Operative, Inc.* (1939) 307 U.S. 533, 569-570, 59 S.Ct. 993, 83 L.Ed. 1446.

2. *License Cases* (1847) 5 How. 504, 588, 12 L.Ed. 256.

3. Farrand, *The Framing of the Constitution* (1913, 1962) p. 45.

of the clause fails to indicate that such a limitation was expected or intended; and it appears from many different sources that no such limitation was understood to exist in the early years.”⁴

§ 209. — — Early Judicial Opinions

In 1821 Marshall decided a case where Virginia had convicted a man for selling lottery tickets in violation of its laws; the defendant claimed the protection of a Congressional statute authorizing the creation of a corporation for this purpose in Washington, D. C.; on the merits, the conviction was upheld, as the Chief Justice felt that Congress did not intend to permit the sale of tickets in states which forbade this; on a prior motion of Virginia to dismiss because of lack of jurisdiction, the motion was denied. In denying this motion Marshall adverted to many things, and used language not necessary to the decision, e. g., “In all commercial regulations, we are one and the same people.”⁵ What did he mean? Was this an authoritative statement that the federal power under the Commerce Clause blanketed the nation? Or should he have made a distinction between foreign (see § 218, *infra*) and interstate commerce?

Three years later, in probably the earliest case where any discussion occurs as to the scope and exclusiveness of the federal commerce power, Marshall felt that “when these allied sovereigns converted their league into a government . . . the whole character in which the states appear, underwent a change . . .” He felt that the “enumerated powers” ought not to be construed strictly, and that the meaning of “commerce” could not be limited to “traffic, to buying and selling, or the interchange of commodities,” but that it “comprehends navigation.” He held that “Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches . . .” Commerce, he wrote, “as the word is used in the constitution, is a unit, every part of which is indicated by the term . . . The

4. Crosskey, *Politics and the Constitution in the History of the United States* (1953) I, 49. This writer disagrees with both of these writers, and analogizes to the Bankruptcy Clause, discussed in § 251, *infra*. That Clause is even more significant as a superficially-exclusive grant of power to Congress, and yet in the early absence of federal bankruptcy laws the Supreme Court upheld state power in this area. *Sturges v. Crowninshield* (1819) 4 Wheat. 122, 199, 4 L.Ed. 529, *Ogden v. Saunders* (1827) 12 Wheat. 212, 368, 6 L.Ed. 606. See also *Tua v. Carriere* (1886) 117 U.

S. 201, 6 S.Ct. 565, 29 L.Ed. 855, and *Butler v. Goreley* (1892) 146 U. S. 303, 314, 13 S.Ct. 84, 36 L.Ed. 981.

5. *Cohens v. Virginia* (1821) 6 Wheat. 264, 413, 5 L.Ed. 257. At pp. 416-417 the Chief Justice adverts to the historical background of the 1787 Convention and felt that it was “convened for the purpose of strengthening the confederation by enlarging the powers of the government, and by giving efficacy to those which it before possessed, but could not exercise.”

word 'among' means intermingled with. A thing which is among others, is intermingled with them. Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior." But now any ambiguity in his language disappears, for Marshall writes the following significant paragraphs:

"It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary.

"Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a state. The genius and character of the whole government seems to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself."

The appellant nevertheless countered with another argument, namely, that the federal power to regulate commerce had to "be exercised within the territorial jurisdiction of the several states," that it was a "plenary" one, and that the "full power to regulate a particular subject, implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it." This argument Marshall refused to answer because "The sole question is, can a state regulate commerce with foreign nations and among the states, while Congress is regulating it?" And since Congress had legislated, the appellant had to win.⁶

6. *Gibbons v. Ogden* (1824) 9 Wheat. 1, 187, 189, 190, 194, 196, 197, 198,

200, 6 L.Ed. 23. See also discussion § 227, *infra*.

Justice Johnson wrote the only other opinion in the case, and agreed as to the judgment but his "conclusions on views of the subject [are] materially different from those of my brethren" His reasoning stemmed from an historical background, the evils then found to be existing, and the method used to overcome these evils, namely, by the grant of the commerce power in its entirety.⁷

Two years later, with the identical bench save for one vacancy not yet filled, and with Justice Johnson not dissenting or otherwise making known his views, Marshall again used language indicating his view that because "Congress has passed no such Act" to regulate the "small navigable creek" there involved, then the state law which empowered the placing of a dam across the stream, and which did "not come into collision with the powers of the general government, . . . [was] undoubtedly within those [powers] which are reserved to the States."⁸

By 1847 the entire bench had changed, and now Taney headed it. In an opinion which set forth the particular question before the court,⁹ the Chief Justice now propounded his own views, with which other Justices not alone agreed but expounded at length:

"It is well known that upon this subject a difference of opinion has existed, and still exists, among the members of this court. But with every respect for the opinion of my brethren with whom I do not agree, it appears to me to be very clear, that the mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to exercise of any power over the same subject by the States. The controlling and supreme power over commerce with foreign nations and the several States is undoubtedly conferred upon Congress. Yet, in my judgment, the State may nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbours, and for its own territory; and such

7. *Ibid.*, at pp. 222-223, and 224, 225-226: "The history of the times will, therefore, sustain the opinion, that the grant of power over commerce, if intended to be commensurate with the evils existing, and the purpose of remedying those evils, could be only commensurate with the power of the States over the subject."

8. *Wilson v. The Black Bird Creek Marsh Co.* (1829) 2 Pet. 245, 251, 252, 7 L.Ed. 412.

9. *License Cases*, *supra* note 2, at p. 578: "The question, therefore,

brought up for decision is, whether a State is prohibited by the Constitution of the United States from making any regulation of foreign commerce or of commerce with another State, although such regulation is confined to its own territory, and made for its own convenience or interest, and does not come in conflict with any law of Congress. In other words, whether the grant of power to Congress is of itself a prohibition to the States, and renders all State laws upon the subject null and void."

regulations are valid unless they come in conflict with a law of Congress.”¹⁰

Taney did not conclude with merely views, but proceeded to discuss Marshall's 1827 opinion which “is the case usually referred to and relied on to prove the exclusive power of Congress and the prohibition to the States.” He agreed that one or two passages, “detached from the context, would seem to countenance this doctrine,” but felt that “a careful examination of that case” would disclose just the opposite, and that the Marshall court had upheld, rather than denounced, the general power of a state to act upon interstate commerce. He then discussed the 1829 opinion, disclosed how consistent it was with the previous one, and then concluded that in these two cases “the court held that a state law was not invalid merely because it made regulations of commerce, but that its invalidity depended upon its repugnancy to a law of Congress passed in pursuance of the power granted.”¹¹

§ 210. — — Conclusions

Whether the preceding quotations of the text writers, or the opinions, are to be accepted is not of present materiality; for the decisions and opinions have utilized the terminology of interstate and intrastate commerce, and the Justices on the Supreme Court decided cases based upon this distinction. We adopt both the terms and the distinction, and examine the Commerce Clause from such a point of view. But, as we shall see, while retaining the form of non-exclusivity the Supreme Court has turned almost full circle to a judicial grant to Congress of a power of practical exclusivity, albeit the states still do act upon interstate commerce and upon occasion Congress specifically desires them so to act, e. g., the 1959 amendments to the federal Labor Relations Act permitting the states to step into the so-called “no-man's land” of labor relations.¹²

10. Justice Catron agreed, at pp. 600, 601, 602-603, as impliedly did Justice Daniel, at pp. 615-618, with Justice Nelson concurring in the opinions of the Chief Justice and Justice Catron; Justice Woodbury was emphatic in “dissenting from any such definition of that [federal commerce] power, as thus exclusive and thus abrogating every measure of a State which by construction may be deemed a regulation of foreign commerce,” at p. 624. Justice M'Lean, with whose

opinion Justice Grier concurred (at p. 631), felt that the commerce grant to the federal government deprived the states of any commerce power, but that the present state laws could be upheld as “they are essentially police laws.” At p. 588.

11. *Ibid.*, at pp. 581, 584.

12. See § 14(c) (2) of the amended Wagner Act, amended by 73 Stat. 519 (1959).

§ 211. — — National Use for National Purposes

The early use of the Commerce Clause was to overturn the state's efforts to enter the interstate area, and in this negating function the Supreme Court may have done more than Congress. But beginning with 1887, and especially since 1933, the Congress has used the Clause as the base upon which to build a federal empire of regulations, controls and mandates. Not alone has it thereby ousted state actions insofar as they conflicted, but in effect it has placed the onus upon the Supreme Court to protect the states from an all-enveloping nationalism and the destruction of the concept of federalism. To a degree even Congress has recoiled from the ultimacy of its power, and has legislatively limited statutes judicially upheld, or has accepted judicial constructions which did not permit extreme power where not specifically authorized, assuming existence. Nevertheless, federal regulation of ocean and even lake shipping, railroads, airplanes, broadcasting, stock exchanges, and other areas through the hosts of alphabetical agencies we so commonly speak of today, indicates the vastness of the federal domain, and the current use of the federal power. Except peripherally, this affirmative exercise of federal power is not examined, and we adopt a method of analysis next suggested.

§ 212. The Method of Analysis of the Commerce Clause—A Caveat

The analysis of the Commerce Clause may follow one or more of numerous methods. The one here used is chosen because it offers a simple approach, permits ready understanding, and offers a sufficient basis for case application. There is a *caveat* required, however, and that is that in several instances a questionable statement of law is used to initiate the discussion; in other words, the Chapter should be read in its entirety to see how the Clause develops from its early interpretations into its modern use, otherwise error may result. The overall method to be used is not difficult of statement or understanding. As just indicated in the preceding section, we do not go into the positive use by the federal government of its national commerce powers for national purposes; rather, we will look to the disagreement between the states and the federal government as to the sharing of the powers they both have and can exercise over the same objects, transactions, persons, etc. This does not necessarily mean that all powers both governments exercise are the same, or even that a similar power is exercised by each simultaneously; each government has many and several types of powers, and each uses whatever and whichever one(s) it desires, regardless of what power(s) the other exercises. It is the conflict so engendered that we analyze.

§ 213. — A Five-Stage Analysis to be Used

With the *caveat* of the preceding section in mind, the method of analysis is a five-stage one and seeks to understand first what the commerce power is, then its federal use *vis-a-vis* the states, its state use *vis-a-vis* the federal, and what two commerce rules or concepts may be utilized for additional understanding. We treat this as follows:

- I. The Development of the Commerce Power—§§ 214–217
- II. The Federal Use of the Commerce Clause—§§ 218–225
- III. State Efforts to Affect or Control the Federal Commerce—§§ 226–232
- IV. The Federal Exclusive or Proscription Rule—§§ 233–235
- V. The Federal Permissive or Preemption Rule—§§ 236–241

§ 214. The Development of the Commerce Power—Early Approach

The commerce power, whether exercised by either or both sovereigns, at first involved and applied to the “exchange of goods; . . . the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation.”¹³ How should the Commerce Clause be interpreted, and how should it be used and applied? Madison vetoed the Internal Improvement Bill of 1817 because, as he put it, the commerce power, “cannot include a power to construct roads and canals, and to improve the navigation of water courses in order to facilitate, promote, and secure such a commerce, without a latitude of construction departing from the ordinary import of the terms”¹⁴ Two years later Marshall felt otherwise about the interpretation to be accorded the Constitution, for in the Bank Case of 1819 he permitted a Congressional power to carry with it the grant of all adequate and appropriate means of executing it;¹⁵ and when, five years later, the Navigation Case came before him, the Chief Justice had no difficulty in defining commerce so as to include navigation.¹⁶ However, the continuing

13. *Gibbons v. Ogden*, supra note 6, at pp. 229–230, per Johnson, J. See also *Freeman v. Hewit* (1946) 329 U.S. 249, 259, 67 S.Ct. 274, 91 L. Ed. 265: “Of course this is an interstate sale. And constitutionally it is commerce no less and no different because the subject was pieces of paper worth \$65,214.20, rather than machines.”

14. *Messages & Papers of the Presidents* (1897) II, 569.

15. See § 98, supra, for analysis of *McCulloch v. Maryland* (1819) 4 Wheat. 316, 4 L.Ed. 579.

16. *Gibbons v. Ogden*, supra note 6.

translation of the conceptual federal jurisdiction into judicially-approved actualities was vividly limited in 1888 as follows:

"No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. The legal definition of the term . . . is as follows: 'Commerce with foreign Nations and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities.' If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufacture, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate and harvest his crop with an eye on the prices at Liverpool, New York and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multifarious, and vital interests—interests which in their nature are, and must be, local in all the details of their successful management." ¹⁷

In 1904 the Great Dissenter felt that "Commerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce. If the act before us is to be carried out according to what seems to me the logic of the argument for the government, which I do not believe that it will

17. *Kidd v. Pearson* (1888) 128 U.S. 1, 20–21, 9 S.Ct. 6, 32 L.Ed. 346, quoting from *County of Mobile v. Kimball* (1881) 102 U.S. 691, 702, 26 L.Ed. 238. In 1939 two dissenters utilized the quoted paragraph, together with other citations, in an

unsuccessful effort to persuade the majority to retain or return to this approach. *N. L. R. B. v. Fainblatt* (1939) 306 U.S. 601, 611–614, 59 S.Ct. 668, 83 L.Ed. 1014. See also text quotation keyed to § 217, fn. 32, *infra*.

be, I can see no part of the conduct of life with which on similar principles, Congress might not interfere.”¹⁸

The development of the power over commerce thus took two courses, first, the definition of the terms so that it was initially extended to encompass more of the subject matter of all forms and types of commerce, but later somewhat restricted, and then finally enlarged to its present scope, and, second, based upon the inter-intra distinction already discussed, the extent to which this enlarging federal power could be used to oust the states from not alone acting upon interstate, but also intrastate, commerce. It is the first question we discuss in this, and the next two sections, while in § 218 we begin the consideration of the second question; both are nevertheless interrelated to the point where an opinion which seemingly holds that the matter is not commerce, may really be saying that it is intrastate commerce and therefore not within the federal power.

§ 215. — Later Approach—A Narrow One

In 1868 the Supreme Court felt that insurance policies were not commerce, for “These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. . . . They are, then, local transactions, and . . . do not constitute a part of the commerce between the States”¹⁹ So was mining held not to be interstate commerce, or the distilling of liquor, or the making of goods, the manufacture of sugar; and so too, were baseball exhibitions held not subject to the scope of the Sherman Antitrust Act, but really for policy, and not factual, considerations.²⁰ Even as to railroads, whose tracks were actually laid

18. *Northern Securities Co. v. United States* (1904) 193 U.S. 197, 402-403, 24 S.Ct. 436, 48 L.Ed. 679. Holmes was inveighing against the majority's application of the Sherman Act to “all direct restraints,” whether or not unreasonable, so that his language is used as language. In *Standard Oil Co. of N. J. v. United States* (1911) 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619, the Court adopted his “rule of reason” in interpreting and applying that statute, and thus emasculated the Holmesian fears.

19. *Paul v. Virginia* (1868) 8 Wall. 168, 183, 19 L.Ed. 357, *revsd.* in *United States v. South Eastern Un-*

derwriters Ass'n (1944) 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440, discussed in § 217, *infra*.

20. *Oliver Iron Mining Co. v. Lord* (1923) 262 U.S. 172, 43 S.Ct. 526, 67 L.Ed. 929, although see *Sunshine Anthracite Coal Co. v. Adkins* (1940) 301 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1623, upholding the regulation of labor and prices, and 30 U.S.C.A. §§ 4(f) to 4(o), providing for the federal inspection of mines; *Kidd v. Pearson*, *supra* note 17; *Hammer v. Dagenhart* (1918) 247 U.S. 251, 38 S.Ct. 529, 62 L.Ed. 101, overruled in *United States v. F. W. Darby Lumber Co.* (1941) 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 614;

between two or more states, the first federal employers' liability act of 1906 was held bad as applied to an employee whether or not his injuries occurred in interstate commerce,²¹ and this narrow interpretation was followed as to the 1934 retirement act.²² In other words, the Supreme Court never denied that the Commerce Clause would prevent state interference or control to some degree, or that it was a plenary federal power, or that it could be used to effectuate the will of Congress in this area; all the Court did was to hold that certain activities, transactions, or situations were either factually not commerce, or else did not come within the legal definition. Differently put, the virility of the Clause was never affected or diminished, only its application; when it did apply, however, the Clause was still a powerful one.

§ 216. — — The De Minimis Doctrine

In the preceding sections we have seen how the Supreme Court first vacillated between the exclusive and non-exclusive views, that it adopted the latter approach, and then how this was applied so as to permit state activity by so judicially defining the activity as to be without the scope of the Commerce Clause. Now we assume that interstate commerce is factually involved, that the activities actually either are or become interstate commerce, and that no question of the attaching federal power is raised. Factually and legally, therefore, we start with conceded interstate commerce. At this point we ask, does this mean that all interstate commerce, regardless of its volume, necessarily must remain within the federal commerce power? For example, ten dollars worth of merchandise moves across the Mississippi; is the federal power to be exercised upon this? Or is it so minute and

United States v. E. C. Knight Co. (1895) 156 U.S. 1, 15 S.Ct. 249, 39 L.Ed. 325, distinguished in *Swift & Co. v. United States* (1905) 196 U.S. 375, 25 S.Ct. 276, 49 L.Ed. 518, and considered reversed in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.* (1948) 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328; *Federal Baseball Club v. National League* (1922) 259 U.S. 200, 42 S.Ct. 465, 66 L.Ed. 898, followed in *Toolson v. New York Yankees* (1953) 346 U.S. 356, 364, 74 S.Ct. 78, 98 L.Ed. 64.

21. *Employers' Liability Cases* (1908) 207 U.S. 463, 28 S.Ct. 141, 52 L. Ed. 297; a second 1908 law now spoke of "interstate transportation" and "engaging in [interstate] commerce," and was upheld in the *Second Employers' Liability Cases*

(1912) 223 U.S. 1, 32 S.Ct. 169, 56 L.Ed. 327. Thereafter the Supreme Court indicated it would soften its first decision, *Illinois Central R. R. Co. v. Behrens* (1914) 233 U.S. 473, 477, 34 S.Ct. 646, 58 L.Ed. 1051, but it was not until 1939 that Congress acted. 53 Stat. 1404.

22. 48 Stat. 1283, held not within the commerce power in *Railroad Retirement Board v. Alton R. R. Co.* (1935) 295 U.S. 330, 55 S.Ct. 758, 79 L.Ed. 1468, although later statutes sought to overcome this decision and a later opinion apparently reverses it. *United States v. Lowden* (1939) 308 U.S. 225, 60 S.Ct. 248, 84 L.Ed. 208, as mentioned in the *Mandeville Island Farms* case, *supra* note 20, at p. 230.

picayune that it should be disregarded? This conceivably might be a question involving discretion on the part of the enforcing officials, but suppose it is taken out of their hands by the judiciary which now says, because it is so factually infinitesimal we shall hold that as a matter of law it is too small (*de minimis*) to become the subject matter of a judicial case or controversy. In other words, the (*de minimis*) doctrine concedes interstate commerce to be factually involved, but creates a fiction that for legal purposes it doesn't exist, and therefore the judiciary refuses to accept jurisdiction. This doctrine, while superficially a quantitative one, cannot be objectified into a rule to be applied indiscriminately; only a case-by-case application is possible, with all of the facts taken into consideration. Illustrations of the application of the *de minimis* doctrine indicate this judicial approach.

In the Chicago Cab Case the Supreme Court felt that although the activity "is clearly a part of the stream of interstate commerce," still "such transportation is too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act;"²³ in this situation the *de minimis* doctrine has no applicability, for "unrelated" is here used with reference to qualitative aspects, whereas we speak of quantitative ones. But these latter can assume various sizes, e. g., the doctrine does not apply, and federal jurisdiction will be exerted, where a local newspaper had approximately one-half of one percent of its circulation going into other states, or even when less than one-half of one percent of the total national output was involved, although here the dissenters felt the doctrine should apply and no federal jurisdiction should attach.²⁴ Furthermore, although this may be somewhat of an extreme, that 40 acres of wheat, withdrawn from sixty million in the national market, is not too small to become subject to Congress' desires.²⁵ The reasoning of the Supreme Court apparently is that although judicial policy is to withdraw jurisdiction from these otherwise *de minimis* cases, Congressional policy will control where its opposed intent is found, that is, that jurisdiction and power should be exerted. "It is the Congress, and not the judicial department, to which the Constitution has given the power to regulate commerce,"²⁶

23. *United States v. Yellow Cab Co.* (1947) 332 U.S. 218, 230, 67 S.Ct. 1560, 91 L.Ed. 2010.

24. *Mabee v. White Plains Pub. Co.* (1946) 326 U.S. 178, 66 S.Ct. 511, 90 L.Ed. 607; *N. L. R. B. v. Fruehauf Trailer Co.* (1937) 301 U.S. 49, 57 S.Ct. 642, 81 L.Ed. 918, *N. L. R. B. v. Friedman-Harry Marks Clothing Co.* (1937) 301 U.S. 58, 57 S.Ct. 645, 81 L.Ed. 921.

25. *United States v. Haley, Jr.* (1959) 358 U.S. 644, 79 S.Ct. 537, 3 L.Ed.2d 567, revsng. (N.D.Tex. 1958) 166 F.Supp. 336 in a one-line per curiam citation of *Wickard v. Filburn* (1942) 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122, where about 12 acres were involved.

26. *Parkersburg & Ohio River Transp. Co. v. City of Parkersburg* (1883) 107 U.S. 691, 701, 2 S.Ct.

and this power "is plenary and extends to all such commerce be it great or small The amount of the commerce regulated is of special significance only to the extent that Congress may be taken to have excluded commerce of small volume from the operation of its regulatory measure by express provision or fair implication."²⁷

§ 217. — The Present Scope—A Wide One

Interstate commerce is no longer restricted by judicial definition to particularized items; regardless of why, the Supreme Court has reversed many old cases and today upholds the federal commerce power over new as well as old conditions, areas, and practices. In the Navigation Case of 1824 the State of New York had granted a monopoly to Fulton and Livingston, who assigned to Ogden, over navigation between New York City and New Jersey; Gibbons used two steamboats between such places, claiming a license under a 1793 act of Congress; the Supreme Court held that in such a direct conflict the federal right was superior, thereby including navigation within the commerce power. Four and a half decades later Florida attempted the same thing as to the erection of a telegraph line along a railroad right of way, and again a federal statute conferred this right upon another; once again, citing the prior case, the Supreme Court denounced the state monopoly. The Chief Justice, for a majority, adumbrated the scope of the Commerce Clause (here used in conjunction with the federal postal power) as follows:

"The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation."²⁸

²⁷ 732, 27 L.Ed. 584. The quotation is taken out of context.

²⁷ N. L. R. B. v. Fainblatt, *supra* note 17, at p. 606.

²⁸ Pensacola Telegraph Co. v. Western Union Telegraph Co. (1878) 96 U.S. 1, 9, 24 L.Ed. 708, citing Gibbons v. Ogden, *supra* note 6.

The scope of the Clause has thus kept pace with the development of the nation, and new methods, ideas, and arrangements are brought within its ken. In reversing an old decision, and now holding the business of insurance to be within the federal power, the majority wrote:

"It is interstate commerce subject to regulation by Congress to carry lottery tickets from state to state. So also is it interstate commerce to transport a woman from Louisiana to Texas in a common carrier; to carry across a state line in a private automobile five quarts of whiskey intended for personal consumption; to drive a stolen automobile from Iowa to South Dakota. Diseased cattle ranging between Georgia and Florida are in commerce; and the transmission of an electrical impulse over a telegraph line between Alabama and Florida is intercourse and subject to paramount federal regulation. Not only, then, may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information. . . ."

"The precise boundary between national and state power over commerce has never yet been, and doubtless never can be, delineated by a single abstract definition. . . ." ²⁹

The present scope of the federal commerce power thus covers not only navigation, insurance, and the items quoted, but also the purchase of goods in one state for transportation to another, for "commerce includes the purchase quite as much as it does the transportation." ³⁰ It also embraces, for example: the immediate dissemination of news gathered from throughout the nation or the world, as well as manipulation of newspaper advertising to eliminate competition; the manufacture and sale of cast iron pipe; the stock market and holding company systems; stock exchange "ticker service" by wire; the sale of natural gas to other states; radio and television broadcasting; ³¹ as well as

29. *United States v. South Eastern Underwriters Ass'n*, *supra* note 19, at pp. 549-550, citations omitted. Two Justices did not participate, three dissented, and so the majority was composed of four, a minority of the Court. Nevertheless, Congress accepted this decision in future legislation, 59 Stat. 33 (1954), giving the states power to act in this area, and this was upheld in *Prudential Insurance Co. v. Benjamin* (1946) 328 U.S. 408, 66 S.Ct. 1142, 90 L.Ed. 1342. See also the 1951 *Lorain Journal* case, *infra* note 31, where the principle is well established today.

30. *American Express Co. v. Iowa* (1905) 196 U.S. 133, 143, 25 S.Ct. 142, 49 L.Ed. 417. Thus the purchase of grain for shipment to another state is federally covered, *Dahnke-Walker Milling Co. v. Bondurant* (1921) 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239, as are the services involved in such a transaction. *York Mfg. Co. v. Colley* (1918) 247 U.S. 21, 38 S.Ct. 430, 62 L.Ed. 963.

31. *Associated Press v. United States* (1945) 326 U.S. 1, 14, 65 S.Ct. 1416, 89 L.Ed. 2013, *Lorain Journal Co. v. United States* (1951)

those activities mentioned in previous sections which disclose other areas under federal control. In the Beet Sugar Case the majority refused to follow

“a reversion to conceptions formerly held but no longer effective to restrict either Congress’ power, or the scope of the Sherman Act’s coverage. The artificial and mechanical separation of ‘production’ and ‘manufacturing’ from ‘commerce’ without regard to their economic continuity, the effects of the former two upon the latter, and the varying methods by which the several processes are organized, related and carried on in different industries or indeed within a single industry, no longer suffices to put either production or manufacturing and refining processes beyond reach of Congress’ authority or of the statute.

“It is true that the first decision under the Sherman Act applied those mechanical distinctions with substantially nullifying effects for coverage both of the power and of the Act. . . . Very soon also came the Shreveport Rate Cases, . . . that manufacturing companies lay within the reach of the power and of the statute, deriving no immunity for their conduct violative of the prohibitions merely from the fact of engaging in that character of activity.

“With extension of the Shreveport influence to general application, it was necessary no longer to search for some sharp point or line where interstate commerce ends and intrastate commerce begins, in order to decide whether Congress’ commands were effective. For the essence of the affectation doctrine was that the exact location of this line made no difference, if the forbidden effects flowed across it to the injury of interstate commerce or to the hindrance or defeat of congressional policy regarding it.

“The formulation of the Shreveport doctrine was a great turning point in the construction of the commerce clause, comparable in this respect to the landmark of *Cooley v. Port Wardens* For, while the latter gave play for state power to work in the field of commerce, the former broke bonds confining Congress’ power and made it an effective instrument for fulfilling its purpose. The Shreveport doctrine cut Congress loose from the haltering labels of ‘pro-

342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162; *Addyston Pipe & Steel Co. v. United States* (1899) 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136; *North American Co. v. S. E. C.* (1946) 327 U.S. 686, 66 S.Ct. 785, 90 L.Ed. 945, *American Power & Light Co. v. S. E. C.* (1946) 329 U.S. 90, 67 S.Ct. 133, 91 L.Ed. 103; *Western Union*

Telegraph Co. v. Foster (1918) 247 U.S. 105, 38 S.Ct. 438, 62 L.Ed. 1006; *F. P. C. v. Natural Gas Pipeline Co.* (1942) 315 U.S. 575, 62 S.Ct. 736, 86 L.Ed. 1037; *F. R. C. v. Nelson Bros. Bond & Mtge. Co.* (1933) 289 U.S. 266, 53 S.Ct. 627, 77 L.Ed. 1166.

duction' and 'manufacturing' and gave it rein to reach those processes when they were used to defy its purposes regarding interstate trade and commerce. In doing so the decision substituted judgement as to practical impeding effects upon that commerce for rubrics concerning its boundaries as the basic criterion of effective congressional action.

"The transition, however, was neither smooth nor immediately complete, particularly for applying the Sherman Act. The old ideas persisted in specific applications as late as the 1930's. . . . The struggle for supremacy between the conflicting approaches was long continued.

. . . .

"In view of this evolution, the inquiry whether the restraint occurs in one phase or another, interstate or intrastate, of the total economic process is now merely a preliminary step, except for those situations in which no aspect of or substantial effect upon interstate commerce can be found in the sum of the facts presented. . . ." ³²

§ 218. The Federal Use of the Commerce Clause Upon State Activities—In General

The foreign aspect of the Commerce Clause is, obviously, of major federal concern, and Congress legislated upon navigation almost immediately;³³ since 1838 Congress has also, for example, required the inspection of steam vessels,³⁴ and the Supreme Court, in 1827, recognized that this vital power could not be hampered by state efforts.³⁵ There Marshall felt that "It is inconceivable, that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value." Therefore, he held, the imported article, in its original package, is free of state taxation until after the first sale by the importer. The federal government may, of course, levy customs duties, and even state instrumentalities discharging a state function are subject thereto, for the words of

32. *The Mandeville Island Farms* case, *supra*, note 20, at pp. 229, 231-233, 234, citations omitted.

33. *E. g.*, *Gibbons v. Ogden*, *supra* note 6, where the 1793 statute was involved. See also *United States v. Grand River Dam Authority* (1960) 363 U.S. 229, 332, 80 S.Ct. 1134, 4 L.Ed.2d 1186, quoting that "There is no constitutional reason why Congress cannot, under the commerce power, treat the watersheds as a key to flood control on

navigable streams and their [non-navigable] tributaries." Congress may thus act under this power in order to improve navigation and to control destructive flood-waters, and may thus penetrate into areas not otherwise within its power.

34. See discussion in *Huron Portland Cement Co. v. City of Detroit* (1960) 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852.

35. *Brown v. Maryland* (1827) 12 Wheat. 419, 6 L.Ed. 678.

the Clause "comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend."³⁶ "It is an essential attribute of the power that it is exclusive and plenary. As an exclusive power, its exercise may not be limited, qualified, or impeded to any extent by state action. . . . The power is buttressed by the express provision of the Constitution denying to the States authority to lay imposts or duties on imports or exports without the consent of the Congress. Article I, § 10, cl. 2. The Congress may determine what articles may be imported into this country and the terms upon which importation is permitted. No one can be said to have a vested right to carry on foreign commerce with the United States. . . . The principle of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce."³⁷ Thus the federal government may, in the field of foreign commerce, do whatever it pleases, at any time, for any purpose, without hindrance.

The field of interstate commerce is not identical with that of foreign, although in 1827 Marshall's *obiter* was that "we suppose the principles laid down in this case [of foreign commerce] to apply equally to importations from a sister state," i. e., interstate commerce.³⁸ His dictum was not followed, and § 227, *infra*, discloses the present judicial view as to state ability to regulate or tax importations. The states thus do exercise power over interstate commerce, which is not found in actual practice where foreign commerce is involved. There is thus an ability of both governments to act upon commerce, and this whether it is inter or intra, as previously discussed. The early argument over whether the federal power was or was not a sole and exclusive one is not here involved; nor is any view set forth concerning the proscription (§ 233) and preemption (§ 236) rules later discussed; what is presently assumed is simple: that all commerce, whether purely interstate, purely intrastate, or beginning as one and ending as the other, or even whether it is so involved and complex as to be incapable of analysis, is acted upon, or is capable of being acted upon, by both the federal and the state governments. This is the assumption we make. Based upon this we then ask, to what degree may the federal government control the commerce which is usually within a state's jurisdiction (§§ 219-225), and to what degree may the states control the commerce

36. *Gibbons v. Ogden*, *supra* note 6, at p. 193, quoted in the *Board of Trustees of University of Illinois v. United States* (1933) 289 U.S. 48, 56, 53 S.Ct. 509, 77 L.Ed. 1025.

(*Champion v. Ames*) (1903) 188 U.S. 321, 348-352, 23 S.Ct. 321, 47 L.Ed. 492.

38. *Brown v. Maryland*, *supra* note 35, at p. 449.

37. *Ibid.*, at pp. 56, 57. See also discussion in the *Lottery Case*

which is usually within the federal jurisdiction (§§ 226-232)? This is a practical approach and, it is felt, by-passes examination of "pure" state or federal power, assumes it is a "mixed" one, and looks to the actualities of the present-day exercise of power and control.

§ 219. — In Particular—In Commerce

The federal control of commerce is unquestioned when the goods or articles or services or items are "in" interstate commerce, that is, actually being transported or going on among the states.³⁹ For example, goods in transit between two cities in separate states are, while the train runs between these points, actually and factually "in" commerce. That the federal power attaches is unquestioned, and not alone to the railroad, the trains, and all other items involved in the actual function of transporting, but also to the objects actually being transported; and by definition, this commerce sometimes "includes the purchase [of the goods] quite as much as it does the transportation,"⁴⁰ and sometimes also the services required to set up and test a machine.⁴¹ Even if a bus, for example, leaves New York City bound for Middletown, both in New York State, and takes a short-cut through New Jersey for about one or two miles, "It is too late in the day to deny that [it is interstate commerce]. . . . simply because the points from and to are in the same State."⁴² "It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection." So wrote Chief Justice Hughes in holding that a fruit canning company came within the federal Labor Relations Act even though its twenty-eight per cent interstate sales were shipped either f. o. b., or c. i. f. San Francisco. His views and reasoning embraced the following:⁴³

"It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the

39. "Transportation alone across state lines is commerce. . . ." The Fainblatt case, *supra* note 17, at p. 606.

40. Dahnke-Walker Milling Co. v. Bondurant, *supra* note 30.

41. York Mfg. Co. v. Colley (1918) 247 U.S. 21, 38 S.Ct. 430, 62 L.Ed. 963.

42. Central Greyhound Lines v. Mealey (1948) 334 U.S. 653, 68 S.Ct. 1260, 92 L.Ed. 1633.

43. Santa Cruz Fruit Packing Co. v. N. L. R. B. (1938) 303 U.S. 453, 466, 466-467, 58 S.Ct. 656, 82 L.Ed. 954. At p. 467, the Chief Justice wrote: "The question of degree is constantly met in other relations," and then illustrated by statutes and cases in other fields.

federal intervention for its protection. . . . The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains. . . .

"To express this essential distinction, 'direct' has been contrasted with 'indirect' and what is 'remote' or 'distant' with what is 'close and substantial.' Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as 'interstate commerce,' 'due process,' 'equal protection.' In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion.

"There is thus no point in the instant case in a demand for the drawing of a mathematical line. And what is reasonably clear in a particular application is not to be overborne by the simple and familiar dialectic of suggesting doubtful and extreme cases. . . ."

§ 220. — — Affecting Commerce

The affectation doctrine has already been quoted in § 217, and there the Beet Sugar Case said that it was "necessary no longer to search for some sharp point or line where interstate commerce ends and intrastate commerce begins, in order to decide whether Congress' commands were effective. For the essence of the affectation doctrine was that the exact location of this line made no difference, if the forbidden effect flowed across it to the injury of interstate commerce or to the hindrance or defeat of congressional policy regarding it." Thus "The power of Congress extends . . . to the protection of that interstate commerce from burdens, obstructions, and interruptions, whatever may be their source," ⁴⁴ and even "to the protections of interstate commerce from interference or injury due to activities which are wholly intrastate," ⁴⁵ e. g., prevent secondary boycotts

44. Supra note 32, referring to citation at note 20, pp. 463-464.

45. The Fainblatt case, supra note 17, at p. 605. In *Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co.* (1922) 257 U.S. 563, 588, 42 S.Ct. 232, 66 L.Ed. 371, the Court upheld an injunction against the state agency which sought to interfere with the intrastate rates established by the I. C. C., saying, as to the inter and intra traffic: "Effective control of the one must

embrace some control over the other in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them. Commerce is a unit and does not regard state lines, and while under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the Nation, cannot ex-

or violence, regulate activities of a local grain exchange, control intrastate rates of intrastate carriers, compel the adoption of safety appliances on rolling stock moving intrastate, and prescribe maximum hours for employees in intrastate activity connected with train movements.⁴⁶ "Indeed, the subject matter is one reachable, and one which Congress has reached, under the federal commerce power, not because it is interstate commerce but because under the doctrine given classic expression in the *Shreveport Case*, Congress can reach admittedly local and intrastate activities 'having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance.'"⁴⁷ In other words, assuming a state has power to act, still, whenever its (intrastate) activities unduly burden or affect interstate commerce, the federal government will now be able, to the extent and the degree required to safeguard and protect that commerce, to control or even void all or any such part of the state's activity.⁴⁸ "In such legislation Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the *Sherman Act*. . . . It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have such effect, as in the case of the *Interstate Commerce Act* . . . and the *National Labor Relations Act* or whether they come within the statutory definition of the prohibited Act as in the *Federal Trade Commission Act*. . . . And sometimes Congress itself has said that a particular activity affects the commerce as it did in

ercise complete effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of state authority or a violation of the proviso."

46. *Coronado Coal Co. v. United Mine Workers* (1925) 268 U.S. 295, 310, 45 S.Ct. 551, 69 L.Ed. 963; *Board of Trade v. Olsen* (1923) 262 U.S. 1, 43 S.Ct. 470, 67 L.Ed. 839; *Houston, E. & W. T. R. Co. v. United States* (1914) 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341; *Southern Ry. Co. v. United States* (1911) 222 U.S. 20, 32 S.Ct. 2, 56 L.Ed. 72; *Baltimore & O. R. Co. v. I. C. C.* (1911) 221 U.S. 612, 31 S.Ct. 621, 55 L.Ed. 878, all taken from the *Fainblatt case*, *supra* note 17, at p. 605, fn. 1.

47. *Bethlehem Steel Co. v. N. Y. State Labor Relations Board* (1947) 330 U.S. 767, 772-773, 67 S.Ct. 1026, 91 L.Ed. 1234, quoting from *Houston E. & W. T. R. Co.*, *supra* note 46, at p. 351.

48. See, e. g., *United States v. Women's Sportswear Manufacturers Ass'n* (1949) 336 U.S. 460, 464, 69 S.Ct. 714, 93 L.Ed. 805: "The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."

the present act, the Safety Appliance Act . . . and the Railway Labor Act. . . . In passing on the validity of legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power.”⁴⁹

But exactly how far may the federal government go in controlling a so-termed purely intrastate activity? As we previously saw, the scope of the definition of interstate commerce has been broadened with the passing years so that it encompasses many acts heretofore said not to be commerce; this may be thought of as a horizontal, expanding definitional line, still to be extended in the future, thus:

← Definition of Commerce →

Now, however, we take the definition as it presently exists, and ask to what extent this commerce power may be “used,” whenever any state activity unduly affects or burdens it, to control purely intrastate activity. Put differently, how deeply into the intrastate heart of a local entrepreneur or government may the federal power now attach? This, in effect, is a vertical line which, added to the horizontal one in a downward direction into the heart of a state, gives us the scope and the depth of the Commerce Clause, or its “T zone.”

← Definition of Commerce →
(Scope)
↓
(Depth)

§ 221. — — — The Water-Drop Concept

The extent to which the affectation doctrine may be applied to control an internal or intrastate activity has just been examined. Where necessary, the entirety of that activity, or any or all parts of it, may be controlled, so long as a “substantial” (harmful) effect on the interstate commerce or the exercise of Congressional power over it is found to exist.⁵⁰ But now we ask, is there any limit to the minuteness of the activity involved? Put differently, can there be a *de minimus* doctrine found here as to “substantiality” which, as in § 216, permits a local act to be

49. The Darby Lumber case, *supra* note 20, at pp. 120–121, citations omitted. See also the Rock Royal Co-op. case, *supra* note 1, at p. 568, where federal power to control wholly local and intrastate milk prices was upheld because the marketing of the milk “is inextricably

cably intermingled with and directly affects the marketing in the area of the milk which moves across state line.”

50. See, e. g., discussion and citation of cases in the Darby Lumber case, *supra* note 20.

ignored? The Wickard and the Haley cases, there cited, give the answer. The second Agricultural Adjustment Act of 1938 in effect enforced quotas in the planting of wheat by levying a rather large tax upon all in excess which was sought to be marketed; Filburn's quota was 11 acres of wheat; but he planted 23, and was therefore refused a marketing card to permit him to market the surplus without paying the penalty; he now sued to enjoin the enforcement of penalties against himself. Haley planted a total of 40 acres out of 60 million in the nation, but in his case not a single bushel of wheat left his farm. In both cases the federal power was upheld, and the federal statute was upheld. That statute defined the marketing quota "not only [to] embrace all that may be sold without penalty but also what may be consumed on the premises." But, argued the farmer, the amount of wheat involved here is so infinitesimal that the effect of his surplus upon the federal or interstate national market is ridiculous. The answer was that the statute restricted his production and he therefore had to "resort to the market . . . to meet his own needs [namely, 12 acres and some portion of the 40, respectively]. That appellee's own contribution to the [national] demand for wheat [through buying locally] may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." And, concluded the opinion on this aspect,

"It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and if induced by rising prices tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices."⁵¹

51. Wickard v. Filburn, *supra* note 25, at pp. 119, 127-129. See also the Darby Lumber case, *supra* note 20, at p. 123, where the court, just the year before, had written: "It [Congress] recognized that in pres-

ent day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great." This case thus adverted to the water-drop con-

The infinitesimal amount of local commerce thus was held not to be decisive, for a quantitative criterion was itself not sufficient; while one drop of water did not make a stream, in effect said the court, millions and millions of drops of water would, if and when added together. Thus the water-drop concept, under the affectation doctrine, permits the federal power to attach under these circumstances. Note also that the affectation was by the withdrawal of the farmer's economic purchasing power and thereby harming the national power.

§ 222. — — Engaged in the Production of Goods for Commerce

The division of commerce into inter and intra enabled numerous early decisions to exempt various activities from the federal power, e. g., the making of goods, the mining of coal, and the refining of sugar;⁵² but the change in judicial thinking is illustrated by the court's views on the federal Fair Labor Standards Act of 1938 which, among other things, provided for the payment of minimum wages to and the working of maximum hours by employees "engaged in commerce or in the production of goods for commerce."⁵³ The Darby Lumber Company was engaged "in the business of acquiring raw materials, which they manufacture into finished lumber with the intent, when manufactured, to ship it in interstate commerce to customers outside the state," and factually they so did. The Company did not pay the minimum wages, it was indicted, and it now claimed that its activities were local, not subject to the federal power, and therefore Congress did not have the constitutional right to control them. The decision, said the Supreme Court, "turns on the question whether the employment . . . is so related to the commerce and so affects it as to be within the reach of the powers of Congress to regulate it." Since the statute set two standards, "engaged in commerce," and "engaged . . . in the production of goods for commerce," and since Darby was concededly not "in" commerce, then the only question was whether the "production" clause was applicable. The High Court reverted to the McCulloch Bank Case for the concept that Congress "may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities," and this "has often been sustained with respect to powers" other

cept for manufacturers and producers, and in the Wickard case for agriculturists and farmers.

52. See §§ 214-215, and *Hammer v. Dagenhart*, supra note 20, holding Congress without power to exclude products manufactured by child labor from interstate commerce,

overruled in the *Darby Lumber* case, supra note 20.

53. 52 Stat. 1060, 29 U.S.C.A. § 201, quoting from §§ 2 and 7 of the Act, with § 15(a) (1) prohibiting interstate shipment of goods produced in violation of the Act.

than commerce.⁵⁴ And since the Court could and did refer to many decisions involving the affectation doctrine, and pointed to the inapplicability of the *de minimis* concept, it found no reason to denounce the law. This statute covers firemen, elevator operators, watchmen, etc., all employees⁵⁵ of buildings whose tenants manufactured clothing produced principally for interstate commerce; and this even though the interstate business itself owned the building but rented 42 percent to intrastate firms; but not where the building owner merely rented executive offices and only 42 percent of the rentable, and 48 percent of the rented, area was occupied by interstate concerns; although a year later the Act was held to cover a washer of "windows on premises used by respondent's customers in the production of goods for interstate commerce."⁵⁶

Since the power of Congress now extends to those employees who are "engaged in the production of goods for commerce," and as both "employees" and "production" are statutorily defined, Congress may redefine and narrow these and other statutory terms (if it increases the coverage another constitutional question is presented). In 1949 Congress reduced the coverage of "produced" by re-defining it; formerly it covered employees working "in any process or occupation necessary to the production" of goods, etc., but now it was made applicable to employees who so worked on goods, "or in any closely related process or occupation directly essential to the production thereof" ⁵⁷ Under this new language the Supreme Court held the statute inapplicable to employees of a construction outfit building a dam to collect water to be supplied to producers of goods for interstate commerce.⁵⁸

54. *McCulloch v. Maryland*, supra note 15. In addition, another "independent" judicial approach was that statutes which controlled or suppressed "unfair methods of competition" could be analogized here, and since these others had been upheld, no reason appeared why the instant act should not also be upheld. At p. 122.

55. As to who are employees, and the basis, see e. g., *Rutherford Food Corp. v. McComb* (1947) 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed. 1772, holding a slaughter-house "boner" to be an employee, and not an independent contractor; but cf. *Walling v. American Needlecrafts, Inc.* (5th Cir. 1943) 139 F.2d 60 (homeworkers are employees under this statute), with *Glenn v. Beard* (6th Cir. 1944) 141 F.2d 376 (same homeworkers in same area

by same court held independent contractors for purposes of Social Security Act coverage).

56. *Kirshbaum v. Walling* (1942) 316 U.S. 517, 62 S.Ct. 1116, 86 L.Ed. 1638; *Borden Co. v. Borella* (1945) 325 U.S. 679, 65 S.Ct. 1223, 89 L.Ed. 1865; 10 East 40th St. Bldg. v. Callus (1945) 325 U.S. 578, 65 S.Ct. 1227, 89 L.Ed. 1806; *Martino v. Michigan Window Cleaning Co.* (1946) 327 U.S. 173, 66 S.Ct. 379, 90 L.Ed. 603.

57. 63 Stat. 910, amending § 3(j), 29 U.S.C. § 203(j), of the Act. For analyses, cases and discussion of this statute, see Forkosch, *A Treatise on Labor Law* (1953) pp. 131-144.

58. *Mitchell v. Zachry Co.* (1960) 362 U.S. 310, 80 S.Ct. 739, 4 L.Ed. 753; see also *Higgins v. Carr Bros. Co.* (1943) 317 U.S. 572, 63 S.Ct.

§ 223. — — The Stream of Commerce

Congress may consider various portions of an industry as being within its power so as "to promote the flow of commerce from the ranges and farms of the West to the consumers in the East,"⁵⁹ and it has "no longer to search for some sharp point or line where interstate commerce ends and intrastate commerce begins"⁶⁰ So long as there is a "current of interstate or foreign commerce,"⁶¹ or a "stream of interstate commerce,"⁶² then federal power attaches and may, as Congress desires, be exercised. However, the instances in which the stream of commerce metaphor "has been used are but particular, and not exclusive, illustrations of the protective power which the Government invokes in support of the present [N.L.R.] Act. The congressional authority to protect interstate commerce from burdens and obstructions is not [so] limited . . . [as] these burdens may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement'; to adopt measures 'to promote its growth and insure its safety'; 'to foster, protect, control and restrain.'"⁶³

§ 224. — — Conclusions

The Commerce Clause gives to the federal government powers over interstate commerce which, for example, permit it to accomplish the same end which another clause cannot, e. g., the Tax Clause.⁶⁴ In this area of national exertion of a national

337, 87 L.Ed. 468, as to the narrow interpretation to be accorded the original statute insofar as inter and intra, and the application of the act, were there concerned.

59. *Stafford v. Wallace* (1922) 258 U. S. 495, 516, 42 S.Ct. 397, 66 L.Ed. 735.

60. *The Mandeville Farms Case*, supra note 20, at p. 232.

61. *The Rock Royal case*, supra note 1, at p. 568.

62. *The Yellow Cab case*, supra note 23, holding the transportation was nevertheless "too unrelated . . . to constitute a part thereof within the meaning of the Sherman Act." But, under the Fair Labor Standards Act, see § 222, federal power would be exercised. In other words, where there is a "stream" the federal power attaches; whether Congress chooses to exercise

this power is another question, and under the Sherman Act in this cab case the court said no, but under the preceding Act, or the Social Security Act, the court must follow the statute's desire to cover these businesses, i. e., the employees thereof.

63. *N. L. R. B. v. Jones & Laughlin Steel Corp.* (1937) 301 U.S. 1, 36-37, 57 S.Ct. 615, 81 L.Ed. 893, citations omitted.

64. *In United States v. Butler* (1936) 297 U.S. 1, 68, 73, 56 S.Ct. 312, 80 L.Ed. 477 (see also § 248, note 1, on this case), denouncing the first triple-A, the court said that the Tax Clause was but the "means to an unconstitutional plan. . . . The Congress cannot invade state jurisdiction to compel individual action; no more can it purchase such action." In *Mulford v. Smith* (1939) 307 U.S. 38, 59 S.Ct. 648, 83

power for national purposes, even though individuals and states are affected, the federal power is supreme and plenary. We have not concentrated upon this nationalistic analysis for, by first looking into the federal efforts to control the state's commerce, and then the state's effort to control the federal commerce, we can obtain a broad and perceptive analysis of the Commerce Clause, concentrating as we do upon interstate commerce. In our analysis of the federal-versus-state power we saw that under its commerce powers the federal government is able to so exercise it as to invade every nook and cranny of a state's activity. This may seem too broad a statement, but no other can be written. It may, perhaps, be a "subversive doctrine" as Justice McReynolds termed it in 1939, and his dissent clearly highlights the extremes involved:

"The Labor Board claims jurisdiction in respect of employment at this establishment upon the theory that the material and garments move in interstate commerce; that disapproved labor practices there may lead to disputes; that these may cause a strike; that this may reduce the factory output; that because of such reduction less goods may move across the state lines; and thus there may come about interference with the free flow of commerce between the states which Congress has power to regulate. So, it is said, to prevent this possible result Congress may control the relationship between the employer and those employed. Also, that the size of the establishment's normal output is of minor or no importance. If the plant presently employed only one woman who stitched one skirt during each week which the owner regularly accepted and sent to another state, congressional power would extend to the enterprise, according to the logic of the Court's opinion.

"Manifestly if such attenuated reasoning—possibility massed upon possibility—suffices, Congress may regulate wages, hours, output, prices, etc. whenever any product of employed labor is intended to pass beyond state lines—possibly if consumed next door. Producers of potatoes in Maine, peanuts in Virginia, cotton in Georgia, minerals in Colorado, wheat in Dakota, oranges in California, and thou-

L.Ed. 1092, the same Justice who wrote the previous opinion now wrote for the majority in upholding the second triple-A which used the Commerce Clause as its base. As for the "purchase" concept, when applied in the Social Security Act Cardozo upheld it in *Steward Machine Co. v. Davis* (1937) 301 U.S. 548, 586, 57 S.Ct.

883, 81 L.Ed. 1279, where he drew "the line intelligently between duress and inducement. . . ." The Butler case is thus not of much vitality today. See also *Sunshine Anthracite Coal Co. v. Adkins* (1942) 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263, and even more so, *Wickard v. Filburn* (1942) 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122.

sands of small local enterprises become subject to national direction through a Board.

"Of course, no such result was intended by those who framed the Constitution. If the possibility of this had been declared the Constitution could not have been adopted. So construed, the power to regulate interstate commerce brings within the ambit of federal control most if not all activities of the nation; subjects states to the will of Congress; and permits disruption of our federated system."⁶⁵

Obviously the Justice was himself indulging in "possibility massed upon possibility," for his commerce fears may be countered by the statement of Holmes that "It is the usual last resort of constitutional arguments to point out shortcomings of this sort,"⁶⁶ and by his challenge to Marshall's fears that "The power to tax is the power to destroy," in the retort, "Not while this Court sits."

§ 225. — — — The Original Use of the Commerce Clause Against the States

We earlier stated, in §§ 211–212, that the federal judiciary took the lead in negating state encroachments upon the federal commerce power, and that it was not until 1887 that Congress first began its positive regulation of the national (and local) economy under the Commerce Clause. This does not mean that Congress did not so legislate, for in the 1824 Navigation Case we saw that a 1793 federal statute was the basis for Marshall's decision voiding a conflicting state law; nevertheless, this was an instance of the use by Congress of its federal powers to control a federal area (navigation being a part of commerce), but it was the Supreme Court which now began, with or without a federal statute having been passed, to denounce state laws and activities by states or individuals which infringed upon or impaired the federal power. For example, to illustrate these state activities which had to be prevented, twelve years before the Supreme Court decided the Navigation Case, the holder of the state's first such monopoly grant sued to enjoin another from operating a steamboat along the Hudson River between New York City and Albany; from the opinions delivered in the state's highest Court of Errors we are somewhat in the dark as to whether the respondent had obtained a license under the federal statute, although the argument of one of Livingston's attorneys claimed that "The bill [for an injunction] exhibits nothing interfering with the powers granted to the States;" from the remainder of the arguments of all parties, and the opinions of the Sen-

65. The Fainblatt case, *supra* note 17, at pp. 609–610.

66. *Buck v. Bell* (1927) 274 U.S. 200, 208, 47 S.Ct. 584, 71 L.Ed. 1000.

ators and the Chancellor, it appears that no federal license was set up as a defence, and that the two major defences were: (a) only Congress could grant patents or rights thereunder; and (b) the state's monopoly grant was in violation of the federal commerce power. The grant was upheld and Chancellor Kent's opinion contains these statements: "Whenever the case shall arise of an exercise of power by congress which shall be directly repugnant and destructive to the use and enjoyment of the appellants' [Livingston's] grant, it would fall under the cognisance of the federal courts, and they would, of course, take care that the laws of the union are duly supported." "It strikes me to be an equally inadmissible proposition, that the state is divested of a capacity to grant an exclusive privilege . . . merely because we can imagine that congress . . . may make some regulation inconsistent When such a case arises . . . there is, fortunately, a paramount power in the supreme court of the United States to guard against the mischiefs of collision." "[U]ntil such congressional regulations appear, the legislative will of this state . . . must be taken to be of valid and irresistible authority."⁶⁷

The great prestige of Chancellor Kent lent weight to his distinction between a state's internal and external commerce, i. e., intra and inter, and undoubtedly this powerful voice influenced the later success of the non-exclusivists over the exclusivists (§§ 208–209). But when the (second) Navigation Case was before him, in 1819, the Chancellor this time did have to contend with a federal statute, with a federal license under it, and which conflicted squarely and directly with the same monopoly grant before him seven years earlier. But this second time he again upheld the state law, which Marshall thereafter promptly denounced.⁶⁸ Thus, despite the lip-service paid to the federal power when not before him, a great jurist had sought to accommodate the federal to the state law even though a head-on collision prevented this. It was these efforts at accommodation, or outright holdings of state superiority, that set the stage for the following three-quarters of a century of judicial negating of state laws and activities.

§ 226. State Efforts to Affect or Control the Federal Commerce Power—Introductory

A bit of history permits an understanding of the forces which smoldered and erupted during early nineteenth century American constitutionalism. Even before the Articles of Confederation were finally ratified the Congress was financially so

67. *Livingston v. Van Ingen* (N.Y. 1812) 9 Johns. 507, 531, 578, 579, 581.

68. *Ogden v. Gibbons* (N.Y. 1819) 4 Johns.Ch. 150, revsd. in *Gibbons v. Ogden*, *supra*.

pinched that it proposed, early in 1781, an amendment to authorize a levy of 5% upon imports, and in 1783 another method to obtain revenue, but both times only one state, first Rhode Island and then New York, refused to grant its consent. Of equal importance were matters of commerce, and in 1784 Congress appealed for a navigation act, saying: "The situation of Commerce at this time claims the attention of the several states, and few objects of greater importance can present themselves to their Notice. The fortune of every Citizen is interested in the success thereof; for it is the constant source of wealth and incentive to industry; and the value of our produce and our land must ever rise or fall in proportion to the prosperity or adverse state of trade." Concerning this appeal Professor Farrand writes:

"Pending a grant of power to congress over matters of commerce, the states acted individually. A uniform policy was necessary, and while a pretense was made of acting in unison to achieve a much desired end, it is evident that selfish motives frequently dictated what was done. Any state which enjoyed superior conditions to a neighboring state was only too apt to take advantage of that fact. Some of the states, as James Madison described it, 'having no convenient ports for foreign commerce, were subject to be taxed by their neighbors, through whose ports their commerce was carried on. New Jersey, placed between Philadelphia and New York, was likened to a cask tapped at both ends; and North Carolina, between Virginia and South Carolina, to a patient bleeding at both arms.' The Americans were an agricultural and a trading people. Interference with the arteries of commerce was cutting off the very life-blood of the nation, and something had to be done."⁶⁹

It could not be expected that sovereigns, which had but a few years ago done as they pleased, would overnight accommodate themselves and their reduced powers to a new position of inferiority to their own creation. They, like Frankenstein, felt that they could control their new creation, and so they did not hesitate to continue in the future as they had before. Witness, if illustration must be given, Chancellor Kent's own two decisions in the preceding section; and witness further the continued state efforts, after their loss in the Navigation Case of 1824, but this time successfully via their police powers, to control commerce.⁷⁰

69. Farrand, *The Framing of the Constitution of the United States* (1913, 1962) p. 7; see also pp. 45, 208. Permission to quote has been granted by Yale University Press.

70. *May of New York v. Miln* (1837) 11 Pet. 102, 9 L.Ed. 648; *Briscoe v. Bank of Kentucky* (1837) 11 Pet.

257, 9 L.Ed. 709; *Charles River Bridge v. Warren Bridge* (1837) 11 Pet. 420, 9 L.Ed. 773. For an analysis of the efforts of another great state judge, Chief Justice Shaw of Massachusetts, also to resolve these conflicts, see Levy, *The Law of the Commonwealth and*

In other words, the conflict between the two sovereigns, heretofore examined from the point of view of the federal powers and their use in depth, i. e., into the heart of a state, is now to be examined from the other coin-face, the state's powers and their use in depth, i. e., into the heart of the federal government. Since it is commerce we treat, we examine several types of state powers which are used *vis-a-vis* the federal commerce power.

§ 227. — Through Its Tax Power

A state's tax power is different from its commerce power, and Marshall early pointed this out. He also felt that "The power of taxation is indispensable to their [the states'] existence, and is a power, which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. . . . When, then, each government exercises the power of taxation, neither is exercising the power of the other."⁷¹ Three years later, however, he denounced a state license tax on importers of foreign merchandise, which prevented them from selling at wholesale, because: (1) it conflicted with the Import-Export Clause, that is, the prohibition upon the states to lay any imposts or duties on imports or exports (§ 228), and (2) it conflicted with the federal commerce power in that it was "in opposition to the act of congress which authorizes importation." Marshall then stated that

"the taxing power of the states must have some limits. It cannot reach and restrain the action of the national government, within its proper sphere. It cannot reach the administration of justice in the courts of the Union, or the collection of the taxes of the United States, or restrain the operation of any law which congress may constitutionally pass. It cannot interfere with any regulation of commerce. If the states may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the state from one port to another, for the purpose of re-exportation? The laws of trade authorize this operation, and general convenience requires it. Or what should restrain a state from taxing any article passing through it, from one state to another, for the purpose of traffic? or from taxing the transportation of articles passing from one state itself to another, for commercial purposes? These cases are all within the sovereign power of the taxation, but would obviously derange the measures of

Chief Justice Shaw (1957) pp. 232-254.

71. *Gibbons v. Ogden*, *supra* note 6, at p. 203.

congress to regulate commerce, and affect materially the purpose for which that power was given.”⁷²

Assuming, therefore, that these two different powers of the two sovereigns are to be applied simultaneously to the same object, how is the court to determine whether the state's tax exertion does or does not “derange the measures of congress to regulate commerce, and affect materially the purpose” thereof? Justice Frankfurter felt this question had posed

“a long, continuous process of judicial adjustment. . . . The power to tax is a dominant power over commerce. Because the greater or more threatening burden of a direct tax on commerce is coupled with the lesser need to a State of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce. The task of scrutinizing is a task of drawing lines. This is the historic duty of the Court so long as Congress does not undertake to make specific arrangements between the national government and the States in regard to revenues from interstate commerce. . . . Considerations of proximity and degree are here, as so often in the law, decisive.”⁷³

The “judicial adjustment” of which Frankfurter spoke begins with the State Freight Tax Case of 1873, which held a Pennsylvania tax on railroad freight passing through it “so far as it applies to articles carried through the state, or articles taken up in the state and carried out of it, or articles taken up without the state and brought into it, is unconstitutional and void.” The court pointed out that the tax was not upon the railroad's fran-

72. *Brown v. Maryland*, *supra* note 35, at pp. 448–449. These cases involved a state requirement that a license be obtained by the entrepreneur who may, in theory, do business: (1) purely within the state; (2) purely interstate; and (3), what is our concern here, partially inter and partially intra. (We may note that even the second cannot escape a state's taxing power, as the cases shortly disclose.) In *Leloup v. Port of Mobile* (1888) 127 U. S. 640, 647, 8 S.Ct. 1380, 32 L.Ed. 311, the license requirement in the third situation was denounced because “The [license] tax affects the whole business without discrimination.” In other words, a properly drawn statute which applied only to the entrepreneurial aspects within the state would be upheld, as in

Allen v. Pullman's Palace Car Co. (1903) 191 U.S. 171, 24 S.Ct. 39, 48 L.Ed. 134, and also if the state court's interpretation of an ambiguous statute so limited it. *Raley & Bros. v. Richardson* (1924) 264 U.S. 157, 44 S.Ct. 256, 68 L.Ed. 615. In general, see also Justice Brandeis' summation of the approach in *Sprout v. City of South Bend* (1928) 277 U.S. 163, 169–171, 48 S.Ct. 502, 72 L.Ed. 833.

73. *Freeman v. Hewit*, *supra* note 13, at pp. 252–255, holding invalid a state's gross sales tax on the sellers of interstate sales. Justices Douglas and Murphy dissented, feeling the court “confuses a gross receipts tax on the Indiana broker with a gross receipts tax on his Indiana customer.” At p. 283.

chise, or upon its business measured by the tons of freight, but that it was "expressly laid upon the freight carried. . . . And this tax is not proportioned to the business done in transportation. It is the same whether the freight be moved one mile or three hundred." The consequences of this tax were felt to be appalling, and "It is of national importance that over that subject [transportation of passengers interstate] there should be but one regulating power, for if one state can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between states remote from each other may be destroyed. The produce of western states may thus be effectually excluded from eastern markets, for though it might bear the imposition of a single tax, it would be crushed under the load of many."⁷⁴ In a companion case, however, the state tax was upheld because it was one "upon the railroad company, measured in amount by the extent of its business, or the degree to which its franchise is exercised,"⁷⁵ although fourteen years later a unanimous court apparently repudiated this view.⁷⁶ However, in 1959, a Supreme Court majority of six felt "that net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same."⁷⁷

74. *Philadelphia & Reading R. R. Co. v. Pennsylvania* (1873) 15 Wall. 232, 273, 280, 282, 21 L.Ed. 146. The Supreme Court upholds a highway use tax on purely interstate buses and trucks, for the privilege of using the roads, unless the tax is shown not to have any reasonable relation to such privilege, *Interstate Transit, Inc. v. Lindsay* (1931) 283 U.S. 183, 51 S.Ct. 380, 75 L.Ed. 953, *McCarroll v. Dixie Greyhound Lines* (1940) 309 U.S. 176, 60 S.Ct. 504, 84 L.Ed. 683, although this claim was rejected in *Bode v. Barrett* (1953) 344 U.S. 583, 73 S.Ct. 468, 97 L.Ed. 567.

75. *State Tax on Railway Gross Receipts (Philadelphia & Reading R. Co. v. Pennsylvania)* (1873) 15 Wall. 284, 294, 21 L.Ed. 164.

76. *Philadelphia & Southern Steamship Co. v. Pennsylvania* (1887) 122 U.S. 326, 7 S.Ct. 1118, 30 L.Ed. 1200.

77. *Northwestern States Portland Cement Co. v. Minnesota* (1959) 358 U.S. 450, 452, 79 S.Ct. 357, 3 L.Ed.

2d 421. Justice Harlan's concurring view "upheld state net income taxes of general application so applied as to reach that portion of the profits of interstate business enterprises fairly allocable to activities within the State's borders." At p. 470. Justice Whitaker's dissent was that the court was upholding a tax "directly on, and thereby regulating, 'exclusively interstate commerce.'" At p. 477. Justice Frankfurter's dissent was predicated upon the inability of the court to devise any formula, for it "can only act negatively," so that "The problem calls for solution by devising a congressional policy." At p. 476 (see also his remarks *supra*, text keyed to note 73). The Justices were all concerned with the necessity that, as the cases in the field put it, interstate commerce must pay its own way, that it cannot place insuperable burdens upon local business, that a fair share of governmental requirements must be borne by all businesses, and that the problem

§ 228. — Through Its Constitutional Powers—Intrastate Commerce

In the preceding section Marshall was quoted on the taxing power of the state, distinguishing it from the commerce power and then disclosing its limitations. In the same opinion the Chief Justice spoke of a state's control upon imports from abroad when, in effect, the intrastate commerce power attached. His language, coupled with a final one-sentence dictum, follows:

"It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibitions in the constitution."

"It may be proper to add, that we suppose the principles laid down in this case, to apply equally to importations from a sister state. . . ." ⁷⁸

This famous "original package doctrine" thus granted to importers the right of the first sale free from state control.⁷⁹ The

was to devise a fair, uniform, non-discriminatory apportionment which still would not unduly burden interstate commerce.

There are numerous other aspects of the "tax problem," e. g., the impact of the Due Process Clause of the 14th Amendment insofar as it may prevent states from exercising jurisdiction outside their own borders, or taxing non-residents on income coming from the taxing state, or on residents on income from without, as in *New York ex rel. Whitney v. Graves* (1937) 299 U.S. 366, 57 S.Ct. 237, 81 L.Ed. 285, and *New York ex rel. Cohn v. Graves* (1937) 300 U.S. 308, 57 S.Ct. 466, 81 L.Ed. 666. We do not go into these problems, or those of inheritance taxes, sales or use taxes, mail order businesses, personal property taxes, and the like, as separate considerations of a detailed nature would require overmuch of space.

Another tax problem involves the allocation of property, analogous to the allocation of income, the moving equipment of a carrier and its

situs for tax purposes, as well as taxation of merchandise in transit. For cases on these subjects see: *Braniff Airways Inc. v. Nebraska State Board* (1954) 347 U.S. 590, 74 S.Ct. 75, 98 L.Ed. 967; *Standard Oil Co. v. Peck* (1952) 342 U.S. 382, 72 S.Ct. 309, 96 L.Ed. 427; *Joy Oil Co., Ltd. v. State Tax Commission* (1949) 337 U.S. 286, 69 S.Ct. 1075, 93 L.Ed. 1366; *Minnesota v. Blasius* (1933) 290 U.S. 1, 54 S.Ct. 34, 78 L.Ed. 131.

78. *Gibbons v. Ogden*, *supra* note 6, quoted in § 227 at fn. 71. The final sentence in the instant quotation is termed a "casual remark" in *Woodruff v. Parham*, *infra* note 80. In *Welton v. Missouri* (1876) 91 U.S. 275, 23 L.Ed. 347, a license was required of a peddler selling out-of-town merchandise, but none of it was home-state; the Supreme Court denounced the license.

79. But not necessarily from federal control, for Congress may still go after the merchandise, even when broken up, so long as it is "unsold." See *McDermott v. Wis-*

consequences of this doctrine were forcefully stated in 1869 by Justice Miller:

"The merchant of Chicago who buys his goods in New York and sells at wholesale in the original packages, may have his millions employed in trade for half a lifetime and escape all state, county and city taxes; for all that he is worth is invested in goods which he claims to be protected as imports from New York. Neither the State nor the city which protects his life and property can make him contribute a dollar to support its government, improve its thoroughfares or educate its children. The merchant in a town in Massachusetts, who deals only in wholesale, if he purchase his goods in New York, is exempt from taxation. If his neighbor purchase in Boston, he must pay all the tax which Massachusetts levies with equal justice on the property of all the citizens.

"These cases are merely mentioned as illustrations. But it is obvious that if articles brought from one State into another are exempt from taxation, even under the limited circumstances laid down in the case of *Brown v. Maryland*, the grossest injustice must prevail, and equality of public burdens in all our large cities is impossible."⁸⁰

In this case a tax was upheld against an auctioneer on all sales by him, as against his claim that some were consigned from another state to be sold at wholesale in their original and unbroken packages. The court felt it to be "a simple tax" and "There is no attempt to discriminate injuriously against the products of other States or the rights of their citizens. . . ." The effect of this decision, but apparently not those of later ones, was to limit the prohibitions of the Import & Export Clause to foreign imports,⁸¹ and to eliminate this Clause from interstate considera-

consin (1913) 228 U.S. 115, 33 S.Ct. 431, 57 L.Ed. 754.

80. *Woodruff v. Parham* (1869) 8 Wall. 123, 137, 19 L.Ed. 382; Chief Justice Taft felt that "This argument is as strong today as when it was written. . . ." *Sonneborn Bros. v. (Keeling) Cureton* (1923) 262 U.S. 506, 521, 43 S.Ct. 643, 67 L.Ed. 1095.

81. In *Hooven & Allison Co. v. Evatt* (1945) 324 U.S. 652, 665, 65 S.Ct. 870, 89 L.Ed. 1252, goods imported for use were held to have the same immunity as those imported for sale, but after being so used "their tax exemption is at an end." In *Youngstown Sheet & Tube Co. v. Bowers* (1959) 358 U.S. 534, 79 S.

Ct. 383, 3 L.Ed.2d 490, the importer of iron ores in bulk from other countries stored them separately from domestic ores, and as required used them in furnaces for the manufacture of steel; an Ohio tax on all personal property was upheld because current operating needs were supplied, so that "the tax was not on 'imports,' nor was it a tax on the materials because they had been imported, but because at the time of the assessment they were being used, in every practical sense, for the purposes for which they had been imported." Justices Frankfurter and Harlan dissented, the former writing that the majority "disregards this historic course of constitutional adjudica-

tion. "The distinction is that the immunity attaches to the import itself before sale, while the immunity in case of an article because of its relation to interstate commerce depends on the question whether the tax challenged regulates or burdens interstate commerce."⁸² Thus in 1885 the court upheld a non-discriminatory tax on coal, brought from Pittsburgh to New Orleans and offered for sale by the flatboat load in the original condition and package, because it "had reached its destination, and had become part of the general mass of property of the city"⁸³ In other words, when the interstate shipment of goods has come to a state of legal rest, for purposes of use or sale, a state may impose a non-discriminatory tax upon the importer so long as it does not unduly burden interstate commerce.

§ 229. — Through Its Police Powers

The police powers of a state are not greatly defined or analyzed here, as Chapter XIII treats them in greater detail. Briefly, it is the power a state has "to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity."⁸⁴ In 1837 a New York statute was upheld even though it required a master of an incoming vessel to report the names, places of birth, age, legal settlement, and occupation of every passenger from abroad landing there; Story dissented because of the principles of the Navigation Case; but the majority felt that although there was "no collision" between the state and federal laws involved, "we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions, namely, those stemming from the "internal police" powers of the state.⁸⁵ In the subsequent series of License Cases, argued in 1845 by Joseph Choate and re-argued in 1847 by Daniel Webster, both seeking to void a state law which required a license

tion" which began with *Brown v. Maryland*, and upholds the state tax "without overruling the decisions" of the past. "Thus, we are left with a confusing series of conflicting cases. . . ."

In Chapter XIII Marshall is quoted on "that immense mass" of state legislation able to be enforced in this area.

82. *Sonneborn Bros. v. Cureton*, supra note 80, at p. 510. Crosskey, *Politics*, supra note 4, I, 295, feels the Import & Export Clause does apply to interstate commerce.

83. *Brown v. Houston* (1885) 114 U. S. 622, 634, 5 S.Ct. 1091, 29 L.Ed. 257.

84. *Barbier v. Connolly* (1885) 113 U. S. 27, 31, 5 S.Ct. 357, 28 L.Ed. 923.

85. *Mayor, etc. of the City of New York v. Miln* (1837) 11 Pet. 102, 139, 9 L.Ed. 648. In *Henderson v. New York* (1876) 92 U.S. 259, 23 L.Ed. 543, a modified version of the statute was nevertheless denounced, impairing the value of the *Miln* case, and in *Edwards v. California* (1941) 314 U.S. 160, 176-177, 62 S. Ct. 164, 86 L.Ed. 119, the *Miln* case was further weakened. Its vitality today is questionable.

to sell liquor, six opinions were written by the nine Justices, all agreeing that the laws were valid. In effect they adopted the argument of a state's attorney, that "The law is not a revenue act, but a police measure. . . . The health laws, quarantine laws, ballast laws, etc., prove that the police power may be extended to imports and importers, if the public safety or welfare demands it."⁸⁶ Thus Taney spoke of the "police powers of a State," and felt that "if the State power be necessary to the preservation of the morals, the health, or safety of the community, it must be maintained."⁸⁷ Two years later Taney and two others dissented from a decision holding void a state requirement that masters pay two dollars to a state officer for each alien passenger landing, the money being for the support of foreign paupers; Taney particularly rested his views upon the police power concept.⁸⁸ The police power was thus ineffectual as against the "domain of legislation which belongs exclusively to the Congress," and the state law "is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the States."⁸⁹ The field of immigration, i. e., foreign commerce, is thus a federal area, but state quarantine laws are upheld in the absence of federal legislation,⁹⁰ as are state game laws in the field of natural resources.⁹¹

Interstate commerce may also be somewhat legislated or acted upon by a state so long as, for example, no supervening or conflicting federal legislation is involved, there is no economic discrimination,⁹² the police power is not used as a subterfuge,⁹³ and there is no undue or injurious burden upon interstate commerce.⁹⁴

86. (1847) 5 How. 504, 536, 12 L.Ed. 256; see also p. 550, another state attorney claiming "The law of Rhode Island is strictly a police law. . . . It was not intended to carry out any object of commercial policy." A third state attorney argued that the statute "was a police regulation, and not a revenue law," but also claimed the article was not an "import". At p. 566.

87. Ibid, at pp. 583, 592. The other Justices also spoke of the police power but additional and other reasons were given for their concurrences.

88. Passenger Cases (1849) 7 How. 283, 487-490, 12 L.Ed. 702.

89. Henderson v. New York, *supra* note 85, at p. 272.

90. Compagnie Francaise de Navigation v. Board of Health (1902) 186

U.S. 380, 22 S.Ct. 811, 46 L.Ed. 1209.

91. Silz v. Hesterberg (1908) 211 U. S. 31, 29 S.Ct. 10, 53 L.Ed. 75.

92. See the line of "drummer cases" beginning with Robbins v. Shelby County Taxing Dist. (1887) 120 U. S. 489, 7 S.Ct. 592, 30 L.Ed. 694, and going into Best & Co. v. Maxwell (1940) 311 U.S. 454, 61 S.Ct. 344, 85 L.Ed. 275, Nippert v. Richmond (1946) 327 U.S. 416, 66 S.Ct. 586, 90 L.Ed. 760, and Memphis Steam Laundry Cleaner, Inc. v. Stone, (1952) 342 U.S. 389, 72 S.Ct. 424, 96 L.Ed. 436 (Also discussing the "peddler cases" in which state taxation has been upheld).

93. E. g., Minnesota v. Barber (1890) 136 U.S. 313, 10 S.Ct. 862, 34 L.Ed. 455.

94. See the principles stated by Chief Justice Stone in Southern

§ 230. — — But Not for Economic Purposes

Where the state's power is exerted against interstate commerce so as to protect its industries or people from national competition then the concept of a great American free trade market is destroyed.⁹⁵ The state's regulations may openly involve taxation and licensing, as previously discussed, or they may also be more subtle, e. g., making it unlawful to sell milk as pasteurized unless processed and bottled within a radius of five miles from a city's center,⁹⁶ or requiring a solicitor to obtain the prior consent of the owners,⁹⁷ or requiring outside producers to be paid minimum prices before the product can be sold inside the state,⁹⁸ or refusing to license a plant inside the state for delivery of its product outside the state because of the economic effect locally,⁹⁹ although if the local producer were required to obtain a local, non-discriminatory¹⁰⁰ license he could not object;¹⁰¹ the inspection type of case, whereby under the police power the inspection of food is ostensibly to protect the health of the people, but so used as to destroy interstate commerce, is also denounced.¹⁰² The natural resources of a state may be regulated for purposes of conservation,¹⁰³ but not for the economic favoring of local industries.¹⁰⁴

Pacific Co. v. Arizona (1945) 325 U.S. 761, 766, 767-770, 65 S.Ct. 1515, 89 L.Ed. 1915.

95. See, e. g., the dissenting view of Justice Frankfurter in *Youngstown Sheet & Tube Co. v. Bowers*, supra note 81, at p. 551: "As one follows the tortuous and anguished endeavors to establish a free trade area within Western Europe, unhampered by interior barriers, against the opposition of inert and narrow conceptions of self-interest by the component nations, admiration for the far-sighted statecraft of the Framers of the Constitution is intensified. Guided by the experience of the evils generated by the parochialism of the new States, the wise men at the Philadelphia Convention took measures to make of the expansive United States a free trade area and to withdraw from the States the selfish exercise of power over foreign trade, both import and export. They accomplished this by two provisions in the Constitution: the Commerce Clause and the Import-Export Clause."

96. *Dean Milk Co. v. City of Madison* (1951) 340 U.S. 349, 354, 71 S.Ct. 295, 95 L.Ed. 329.

97. *Breard v. Alexandria* (1951) 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1933.

98. *Baldwin v. G. A. F. Seelig, Inc.* (1935) 249 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032.

99. *Hood & Sons, Inc. v. DuMond* (1949) 336 U.S. 525, 69 S.Ct. 657, 93 L.Ed. 865.

100. See, e. g., *Bourjois v. Chapman* (1937) 301 U.S. 183, 57 S.Ct. 691, 81 L.Ed. 1027.

101. *Milk Control Board v. Eisenberg Farm Products* (1939) 306 U.S. 346, 59 S.Ct. 528, 83 L.Ed. 752.

102. E. g., *Minnesota v. Barber*, supra note 93, at pp. 321-323 (meat); *Voight v. Wright* (1891) 141 U.S. 62, 11 S.Ct. 855, 35 L.Ed. 638 (flour).

103. *Geer v. Connecticut* (1896) 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793; *Hudson Water Co. v. McCarter* (1908) 209 U.S. 349, 28 S.Ct. 529, 52 L.Ed. 848.

104. *Foster-Fountain Packing Co. v. Haydel* (1928) 278 U.S. 1, 49 S.Ct. 1, 73 L.Ed. 147; *Pennsylvania v. West Virginia* (1923) 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117, in which Holmes' dissent favored a

§ 231. — — Or to Discriminate Against or Unduly Burden Interstate Commerce

The state's powers may require legislation and uphold regulations which nevertheless discriminate against interstate commerce. A question of fact is sometimes present, as well as of law, and it is these fact cases which provide difficulty. For example, a statute which requires peddlers of specified merchandise not produced within the state to obtain special licenses, or imposes an "annual privilege tax" or license fee upon out-of-towners, is obviously bad;¹⁰⁵ but a state law which denied a foreign corporation transacting business in the state the right to sue in its courts upon any contract made within it, unless and until the corporation first had filed certain information with the Secretary of State and obtained a certificate from him, was upheld.¹⁰⁶ The majority opinion in this last situation emphasized the fact that the foreign corporation's representatives within the state had done much more than merely take orders, and concluded that "Lilly is conducting an intrastate as well as an interstate business in New Jersey."¹⁰⁷ The general principles here involved permit the state's police powers to

"act, in many areas of interstate commerce and maritime activities, concurrently with the federal government. . . .

"The basic limitations upon local legislative power in this area are clear enough. . . .

"In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might in-

state's "preference" to its citizens of its natural resources.

105. See, e. g., *Welton v. Missouri*, supra note 78, and *Best & Co. v. Maxwell*, supra note 92.

106. *Eli Lilly & Co. v. Sav-On-Drugs, Inc.* (1961) 366 U.S. 276, 81 S.Ct. 1316, 6 L.Ed.2d 288. Four dissenters felt that the entire line of "drummer cases" (see note 92, supra) had thus been repudiated, while a majority concurring Justice disagreed as to this; in other words, regardless of the impact of the case in particular, five (a majority) Justices continue the drummer cases.

107. *Ibid.*, at p. 279. The concurring opinion gave additional factu-

al basis for this conclusion. See also *Bob-Lo Excursion v. Michigan* (1948) 333 U.S. 28, 68 S.Ct. 358, 92 L.Ed. 455, sustaining a statute requiring racial equality as to a vessel (the corporate owner was practically the sole owner of the island) going between Detroit and a Canadian Island which, for practical purposes, was used solely by Detroiters as their "Coney Island." Justice Jackson dissented, feeling that since the majority admitted foreign commerce was involved, no state power could be exerted; however, he continued, the majority "subjects it to the state police power on the ground that it is not very foreign."

directly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.' . . . But a state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary." ¹⁰⁸

§ 232. — Through Inspection Laws

The Constitution, in Art. I, § 10, cl. 2, specifically prohibits a state from laying any imports or duties on imports or exports. This Import-Export Clause has one exception, namely, "except what may be absolutely necessary for executing its inspection Laws . . . and all such Laws shall be subject to the Revision and Control of the Congress." The right of a state to inspect foreign commerce is thus specifically recognized, given constitutional authority, but is slightly limited. Marshall felt that "The object of inspection laws, is to improve the quality of articles produced by the labour of a country; to fit them for exportation, or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States and prepare it for that purpose." ¹⁰⁹ In other words, point of ori-

108. *Huron Portland Cement Co. v. Detroit* (1960) 362 U.S. 440, 442-444, 80 S.Ct. 813, 4 L.Ed.2d 852, upholding a local air pollution safety law, even though a federal license was held by the ship, where no undue burden was shown. For an illustration of "undue burden" see also *Edwards v. California* (1941) 314 U.S. 160, 177, 62 S.Ct. 164, 86 L.Ed. 119, unanimously denouncing the "oakie law" preventing there a citizen of Texas from moving into California; four Justices felt the Privileges & Immunities Clause of the 14th Amendment (see Chapter XVII) applied, while five felt that the Commerce Clause applied, holding that the state law "imposes an unconstitutional burden upon interstate commerce. . . ."

In the *Huron* case the court also said: "By contrast [to the federal statutes] the sole aim of the Detroit ordinance is the elimination of air pollution to protect the health and enhance the cleanliness of the local community. . . ."

"The mere possession of a federal [ship] license, however, does not immunize a ship from the opera-

tion of the normal incidents of local police power, not constituting a direct regulation of commerce. Thus, a federally licensed vessel is not, as such, exempt from local pilotage laws, or local quarantine laws, or local safety inspections, or the local regulation of wharves and docks. Indeed this Court has gone so far as to hold that a state, in the exercise of its police power, may actually seize and pronounce the forfeiture of a vessel 'licensed for the coasting trade, under the laws of the United States, while engaged in that trade.' The present case obviously does not even approach such an extreme The ordinance does not exclude a licensed vessel from the Port of Detroit, nor does it destroy the right of free passage. We cannot hold that the local regulation so burdens the federal license as to be constitutionally invalid." At pp. 445, 447-448, citations omitted. See also *Hannibal & St. Joseph R. R. Co. v. Husen* (1878) 95 U.S. 465, 472, 24 L.Ed. 527.

109. *Gibbons v. Ogden*, supra note 6, at p. 203. As for the present abil-

gin laws seek to maintain a state's reputation, e. g., Wisconsin cheeses, Kentucky bourbon. But what of point of destination laws, that is, Wisconsin and Kentucky now fear that products from Maine and Oregon may be harmful to their own citizens?

Where is the basis for a state's inspection power over incoming interstate commerce? The answer is its police powers, and it was early conceded that under it a state could prevent the entry "into a community [of] malignant diseases, or anything which contaminated its morals, or endangers its safety. . . . From the explosive nature of gunpowder, a city may exclude it. . . . These exceptions are always implied in commercial regulations, where the general government is admitted to have the exclusive power. They are not regulations of commerce, but acts of self-preservation."¹¹⁰ And this self-preservation extends to animals, fertilizer, cement, milk,¹¹¹ etc. Foreign and interstate commerce are therefore treated alike, and whether under the Inspection Clause which relates to foreign commerce, or under their police powers, which here relate to interstate commerce, the states may inspect.

An inspection law may be judicially examined to see if it is really for this purpose, and if it clearly discriminates against articles from another state will denounce it.¹¹² Such laws are applicable to articles coming into and leaving a state, but are always subject to the paramount federal regulatory power.¹¹³ Under the guise of an inspection charge a policing expense may not be included, as the two are essentially different, nor may an inspection fee which is sixty times the actual cost of inspection be charged, nor one which is largely in excess of the cost of inspection, although one which "does not materially exceed the cost of

ity of the federal powers to penetrate even this area of state activity, see § 218, *supra*, and those following.

110. *License Cases*, *supra* note 86, at pp. 589-590. "The import must be of such a character as to produce, by its admission or use, a great physical or moral evil." At p. 593. See also pp. 600-601, where Justice Catron pointed out that the federal "exclusive" power (as to this see §§ 208-209, *supra*) was not being made subject to an overriding state police power, which the states could define, etc. He felt the police power should be limited to activities not in foreign or interstate commerce, i. e., when they were intrastate commerce only. At p. 608.

111. E. g. *Mintz v. Baldwin* (1933) 289 U.S. 346, 53 S.Ct. 611, 77 L.Ed. 1245; *Patapsco Guano Co. v. North Carolina Board of Agriculture* (1898) 171 U.S. 345, 18 S.Ct. 862, 43 L.Ed. 191; *Hale v. Bimco Trading* (1939) 306 U.S. 375, 59 S.Ct. 526, 83 L.Ed. 771; and see the milk cases in notes 96, 98, 99, 101, *supra*, regulation held bad because of economic consequences.

112. *People v. Campagne General Transatlantique* (1883) 107 U.S. 59, 2 S.Ct. 87, 27 L.Ed. 383, *Minnesota v. Barber*, *supra* note 93.

113. *Turner v. Maryland* (1883) 107 U.S. 38, 2 S.Ct. 44, 27 L.Ed. 370, *Currin v. Wallace* (1939) 306 U.S. 1, 59 S.Ct. 379, 83 L.Ed. 441.

inspection" is upheld.¹¹⁴ The reason is that taxes may not be raised under the guise of inspecting, nor may discrimination be thereby practiced, nor may interstate commerce be subjected to an undue burden. The court will therefore undertake an examination of the costs of the inspection to determine the true facts,¹¹⁵ although "The law being otherwise valid, the amount of the inspection fee is not a judicial question; it rests with the legislature to fix the amount, and it can only present a valid objection when it is shown that it is so unreasonable and disproportionate to the services rendered as to attack the good faith of the law."¹¹⁶

§ 233. The Federal Exclusive or Proscription Rule—In General

In §§ 208-209 the "exclusive" and "non-exclusive" aspects of the federal commerce power were examined. It was there seen that the former early approach had given way to the non-exclusive one, and in the sections which followed this was made clearer. The urge to commerce exclusiveness still lingers, however, and the concept and illustration of its application appear necessary. Briefly, the exclusive approach was that the grant of the commerce power automatically excluded the states from having any such power, or any aspect of it, left. Put differently, the states have no power to legislate or act upon any kind or type of commerce, and that it is the federal government only which has or can exercise such a power. The states are therefore proscribed from acting in this field.

Against this absolutism there was a revolt, and states were accorded not alone a power over intrastate commerce, but also the use of their police powers for other purposes even though interstate commerce was affected, but not unduly burdened, etc. In other words, a sort of partnership or concurrency was established, but always with the federal power being the senior partner and supreme. The later exclusive approach refined its original absolutism and then in effect conceded that states could act upon commerce but said that if, or where, the subject-matter was national, so as to require uniform legislation, then the states were barred and could not act as this area was reserved exclusively for the federal power. "It is not necessary . . . to go at large into the much-debated question whether the power given to Congress by the Constitution to regulate commerce among the

114. *D. E. Foote Co. v. Stanley* (1914) 232 U.S. 494, 34 S.Ct. 377, 58 L.Ed. 698; *Hale v. Bimco Trading*, supra note 111; *Standard Oil Co. v. Graves* (1919) 249 U.S. 389, 39 S.Ct. 320, 63 L.Ed. 662, *Phipps v. Cleveland Refining Co.* (1923) 261 U.S. 449, 43 S.Ct. 418, 67 L.Ed. 739; *Great Northern Ry. Co. v. Wash-*

ington (1937) 300 U.S. 154, 57 S.Ct. 397, 81 L.Ed. 573.

115. *Patapsco Guano case*, supra note 111.

116. *New Mexico ex rel. E. J. McLean & Co. v. Denver & R. G. Ry.* (1906) 203 U.S. 38, 55, 27 S.Ct. 1, 51 L.Ed. 78.

states is exclusive," said the Court in 1873, because another approach brought about the same result. The "rule has been asserted with great clearness, that whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress."¹¹⁷ Whether it is a rule of exclusiveness or of proscription is not of much practical difference, for the effect is the same, namely, that the states can now not act, that Congress exercises this power, and that Congress may do as it desires.

§ 234. — Application

Pursuant to this sophisticated approach to the exclusive or proscription doctrine of federal power over commerce, the judiciary had to examine each case to determine if the subject-matter was national in character, and if uniform regulation was required. For example, a state tax upon the freight of a railroad passing through its jurisdiction was denounced because "It is of national importance that over that subject there should be but one regulating power, . . . [otherwise] commercial intercourse between states remote from each other may be destroyed."¹¹⁸ So, too, where beer was transported interstate in sealed, original packages and barrels, and the incoming state's prohibition law was sought to be enforced (before the 21st Amendment), since this commodity was "national in its character, and must be governed by a uniform system"¹¹⁹ And in 1878 the Supreme Court had before it a state segregation law which was enforced on a steamboat plying between New Orleans and Vicksburg, touching at intermediate points also; the law was voided because the Mississippi River passed through ten different states, "The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive

¹¹⁷. *State Freight Tax*, *supra* note 74, at pp. 279, 279-280. See also *Leisy v. Hardin* (1890) 135 U.S. 100, 108, 10 S.Ct. 681, 34 L.Ed. 128: "Where the subject-matter requires a uniform system as between the states, the power controlling it is vested exclusively in Congress, and cannot be encroached upon by the states. . . ."

Attention should be called to the statements in the cited and quoted cases, using a disjunctive for the requirements that either a national

subject-matter be involved, or else that uniform legislation is required, whereas the text makes this a disjunctive. In the context of the cases it would appear that either one of these two in effect contains the requirement of the other; therefore the text statement makes these conjunctives.

¹¹⁸. *State Freight Tax*, *supra* note 74, at p. 280.

¹¹⁹. *Leisy v. Hardin*, *supra* note 117, at p. 109.

of great inconvenience and unnecessary hardship. . . . Uniformity in the regulation by which he [the carrier] is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by state lanes, has been invested with the exclusive power of determining what such regulations shall be." ¹²⁰

§ 235. — Conclusions—The Present Rule

The exclusive rule is no longer available in the area of interstate commerce, and the modern approach may conceivably be expressed somewhat as follows: (a) under the Commerce Clause the power of Congress is supreme; (b) where conditions require uniformity in legislation over interstate commerce, Congress may or may not act; (c) until Congress acts, or does not disclose an intent that the states may not act in the absence of its own legislation, then the states may act but under certain limitations (this overall approach is discussed in detail in the sections which follow); ¹²¹ (d) if, however to b we add the fact that the subject-matter is national in character, then c does not follow but (e) does, namely, that under conditions of b plus d, the states cannot act because the intent of Congress, in the absence of its own legislation, is that no legislation is to be applied; (f) however, where the states are so proscribed, the power of Congress is sufficient to remove this legalistic block of intent and by affirmative legislation permit the States to act within whatever limitations it prescribes. Thus the Court said that "the responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the state in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action." ¹²² In this particular instance Congress took the hint, acted that same year, and a day after the enabling act took effect, a test case was brought. The following year the High Court upheld the statute because

120. *Hall v. DeCuir* (1878) 95 U.S. 485, 489-490, 24 L.Ed. 547.

121. In note 117, *supra*, we call attention to the fact that the cases used the disjunctive, that is, that either uniformity or national character was sufficient to oust the states; we, however, stated we would use the conjunctive, that is, that both these were requirements, and that unless both were present the states would not be ousted. Thus, in this instance, where only one is present, the states may continue to act; however, in the next

sentence, both are assumed to be present, which automatically ousts the states.

The reason for this conjunctive, and not disjunctive, approach is because not alone are the cases not too clear on this, but, as note 117 disclosed, it would appear that the cases assumed that if one is present the other also is; here we are making no assumptions but stating each requirement separately.

122. *Leisy v. Hardin*, *supra* note 117, at pp. 123-124.

Congress "simply removed an impediment to the enforcement of the state laws. . . . It imparted no power to the state not then possessed This is not the case of a law enacted in the unauthorized exercise of a power exclusively confided to Congress, but of a law which it was competent for the state to pass, but which could not operate. . . . until the passage of the act of Congress. That act in terms removed the obstacle. . . ." ¹²³

§ 236. The Federal Permissive or Preemption Rule—In General

The disagreement between the exclusive and non-exclusive concepts has already been discussed in some detail. The preemption doctrine builds upon the non-exclusive approach, and has already been given. Briefly, it considers interstate commerce as within the ambit of both state and federal jurisdictions, so that either or both governments may act upon it, subject always to the paramount interests of the national welfare. The states may thus act upon commerce unless there is an actual or an implied preemption federally, or unless the state acts discriminatorily or in such a manner as to unduly burden interstate commerce. This general approach is developed somewhat in the following sections.

§ 237. — In Particular—The Basic Concepts

In 1812 Chancellor Kent, of New York, felt that states could exercise "liberty to make their own commercial regulation" involving interstate commerce, and that "The limits of this power seem not to be susceptible of precise definition. . . . The states are under no other restrictions than those expressly specified in the constitution, and such regulations as the national government may, by treaty, and by laws, from time to time, prescribe." ¹²⁴ A few years later Marshall, in the *Navigation Case*, adverted to a federal statute of 1789 which "acknowledges a concurrent power in the states to regulate the conduct of pilots," and then concluded: "The act unquestionably manifests an intention to leave this subject entirely to the states, until Congress should

^{123.} In *re Rahrer* (1891) 140 U.S. 545, 564-565, 11 S.Ct. 865, 35 L.Ed. 572. See also *International Shoe Co. v. Washington* (1945) 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95. It goes without overmuch repetition, of course, that state action is not alone limited to the area of permissive Congressional legislation, but also by the limitations heretofore discussed, e.g., not for economic reasons, no undue burden upon interstate commerce.

The *Wilson Act*, which enabled the states to overcome the *Leisy case*,

supra note 117, was emasculated by the decision in *Rhodes v. Iowa* (1898) 170 U.S. 412, 18 S.Ct. 664, 42 L.Ed. 1088 but the *Webb-Kenyon Act* of 1913 overcame the *Rhodes* holding (the statute was vetoed by Taft but passed by Congress over the veto). The new statute was upheld in *Clark Distilling Co. v. Western Maryland Ry. Co.* (1917) 242 U.S. 311, 37 S.Ct. 180, 61 L.Ed. 326.

^{124.} *Livingston v. Van Ingen* (N.Y. 1812) 9 Johns. 507.

think proper to interpose”¹²⁵ When a Pennsylvania statute of 1803, enacted in reliance upon the federal statute of 1789, came before the Supreme Court in 1851, six “non-exclusive” Justices felt more strongly than Marshall had put it; but in their majority opinion the late Chief Justice’s name was not mentioned, the Navigation Case was not cited, and only twice in eleven pages were cases cited at all, the first time four, and the second time three. The reason is simple. Marshall had also given comfort to the two “exclusive” dissenters who quoted him and the Navigation Case at length; the concurring Justice felt still more strongly than did the majority, and concluded that the power to so regulate pilots “is an original and inherent power in the States, and not one to be merely tolerated, or held subject to the sanction of the federal government.”¹²⁶ Chief Justice Stone, in 1945, stated the basic concepts simply:

“Although the commerce clause conferred on the national government power to regulate commerce, its possession of the power does not exclude all state power of regulation. Ever since [1829 and 1851] it has been recognized that, in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it. Thus the states may regulate matters which, because of their number and diversity, may never be adequately dealt with by Congress. When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority.”¹²⁷

125. *Gibbons v. Ogden*, supra note 6, at pp. 207, 208. He did not, however, draw the connection the text apparently draws, but felt that Congress could adopt state laws upon the subject, which in effect it had done.

126. *Cooley v. The Board of Wardens of Philadelphia* (1851) 12 How. 299, 326, 13 L.Ed. 996. See also *Leisy v. Hardin*, supra note 117, at p. 109, where Chief Justice Fuller cites the *Cooley* case after writing that “where, in relation to the subject-matter, different rules may be suitable for different localities, the states may exercise pow-

ers which, though they may be said to partake of the nature of the power granted to the general government, are strictly not such, but are simply local powers, which have full operation until or unless circumscribed by the action of Congress in effectuation of the general power.”

127. *Southern Pacific Co. v. Arizona* (1945) 325 U.S. 761, 766-767, 65 S. Ct. 1515, 89 L.Ed. 1915 (citation omitted). See also *South Carolina State Highway Department v. Barnwell Bros.* (1938) 303 U.S. 177, 185, 58 S.Ct. 510, 82 L.Ed. 734.

§ 238. — — The Limitations Upon State Action—Statutory Enactments

The limitations upon the power of the states to act, apart from the constitutional ones heretofore mentioned, are the express statutory enactments, discussed here, and those which the judiciary has formulated (§ 239). Congress has power to oust the states completely, foreclosing any action whatsoever on their part. It is not necessary that Congress itself should legislate positively upon the subject; it may desire no legislation of any kind, and may therefore create a no-man's land.¹²⁸ Throughout this aspect of the preemption doctrine it is the intent of Congress which controls. This intent may be express, or it may be implied; the former, of course, assumes no ambiguity, else judicial interpretation is required; the latter in effect necessitates judicial examination and effectuation, but it is still the intent of Congress which controls, once ascertained. The intent need not be expressed in words, but may be through Congressional silence,¹²⁹ acquiescence, or otherwise.¹³⁰ The principle is simple, and there is no opposition by anyone to it, but the application is sometimes difficult; the facts become more important than the law.

§ 239. — — — Judicially Formulated

The judiciary has formulated its own limitations upon state actions in this area, e. g., "Evenhanded local regulation to effectuate a legitimate local public interest is valid unless preempted by federal action . . . or unduly burdensome on maritime activities or interstate commerce."¹³¹ The state law must not be "a revenue measure," nor may it prohibit interstate commerce or license it on conditions which restrict or obstruct it,¹³² and it must not be unduly burdensome upon the federal commerce power.

128. See, e. g., *Freeman v. Hewit* (1946) 329 U.S. 249, 57 S.Ct. 274, 91 L.Ed. 265.

129. See, e. g., *Leisy v. Hardin*, supra note 117, at p. 160, where the dissenters felt that "The silence and inaction of Congress upon the subject, during the long period since the decision of the License Cases, appear to us to require the inference that Congress intended that the law should remain as thereby declared by this court, rather than to warrant the presumption that Congress intended that commerce among the states should be free from the indirect effect of such an exercise of the police power for the public safety, as had been adjudged by that deci-

sion to be within the constitutional authority of the states."

130. See, e. g., *Bethlehem Steel Co. v. N. Y. S. L. R. B.*, supra note 47, at p. 772: "Our question is primarily one of the construction to be put on the Federal Act. It long has been the rule that exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of such result is wanting."

131. *Huron Portland Cement Co. v. Detroit*, supra note 108, at p. 443.

132. *California v. Thompson* (1941) 313 U.S. 109, 61 S.Ct. 930, 85 L.Ed. 1219.

These are but a few of the judicial expressions which exhibit judicial concern and concepts which, when applied to a set of facts, permits the judiciary to safeguard the federal power.

§ 240. — — The Interstices Doctrine—The Permitted State Action

What are the permitted state activities within the preemption doctrine as examined to this point? They range from 100% to 0%, that is, from full and complete control to absolutely no control whatsoever. As stated, it is the intent of Congress which grants nothing, little, much, or all to the states, and if there is an overlapping of controls then here, too, the federal intent is determinative. The interstices doctrine states just this, that state action is permitted not alone to the extent that Congress has expressly or impliedly granted, but also within the cracks of federal legislation in the field. For example, "For many years Congress has maintained an extensive and comprehensive set of controls over ships and shippers. . . . The thrust of the federal inspection laws is clearly limited to affording protection from the perils of maritime navigation. . . . We conclude that there is no overlap between the scope of the federal ship inspection laws and that of the municipal ordinance here involved" which seeks to prevent air pollution.¹³³ Or, in another situation, Congress granted the I.C.C. power "to execute and enforce the provisions of" the basic statute, amongst its sections being one which required all carriers to establish and enforce just and reasonable regulations affecting the issuance, form, and substance of bills of lading; a carrier's bill of lading contained a clause exempting it from liability for loss of the goods by fire; an Arkansas statute declared it unlawful for a carrier to limit or abrogate its common law duties or liabilities; "No act of Congress or order of the commission prescribed a form of bill of lading for this shipment But that does not sustain their [the shipper's] contention that Congress has not evinced an intention to regulate bills of lading;" and so the Court held the Congressional intent was here to preempt this particular aspect and not to permit the state so to act.¹³⁴ And, yet, in another case where both jurisdictions

133. *Huron Portland Cement Co. v. Detroit*, *supra* note 108, at pp. 444, 445, 446.

134. *Missouri Pacific R. R. Co. v. Porter* (1927) 273 U.S. 341, 345, 47 S.Ct. 383, 71 L.Ed. 672. At pp. 345-346, the Court stated: "The general regulation of the 'issuance, form, and substance' of bills of lading is broad enough to cover contractual provisions, like the one

involved in this case, exempting railroads from liability for loss of shippers' property by fire. Congress must be deemed to have determined that the rule laid down and the means provided to enforce it are sufficient and that no other regulation is necessary. Its power to regulate such commerce and all its instrumentalities, is supreme; and, as that power has been exerted, state laws have no

had similar requirements, in effect the state law supporting and enforcing the federal one, the Supreme Court permitted the state law to remain,¹³⁵ as it did also where no federal agency regulation made a license mandatory before a ticket agent could sell an interstate bus ticket.¹³⁶

§ 241. — As Applied in Administrative Law

In place of acting itself upon the commerce Congress may, as it began in 1887 through the I.C.C., delegate to an administrative agency power to act within some area. If the delegation contains express prohibitions, limitations, or authorizations upon or for state action, then of course the agency is bound to honor these commands, as must the states; but

“When Congress has outlined its policy in rather general and inclusive terms and delegated determination of their specific application to an administrative tribunal, the mere fact of delegation of power to deal with the general matter, without agency action, might preclude any state action if it is clear that Congress has intended no regulation except its own. In other cases, Congress has passed statutes which initiate regulation of certain activities, but where effective regulation must wait upon the issuance of rules by an administrative body. In the interval before those rules are established, this Court has usually held that the police power of the state may be exercised. But when federal administration has made comprehensive regulations effectively governing the subject matter of the statute, the Court has said that a state regulation in the field of the statute is invalid even though that particular phase of the subject has not been taken up by the federal agency. However, when federal administrative regulation has been slight under a statute which potentially allows minute and multitudinous regulation of its subject, or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases

application. They cannot be applied in coincidence with, as complementary to or as in opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction.”

135. *People v. Zook* (1949) 336 U.S. 725, 69 S.Ct. 841, 93 L.Ed. 1005.

136. *California v. Thompson*, *supra* note 132, where fraudulent conduct

by ticket agents had become harmful to the public; the court in this case also set forth a multiplicity and variety of permitted state requirements in the field of transportation. See also *Terminal R. R. Ass'n v. Brotherhood of Railroad Trainmen* (1943) 318 U.S. 1, 63 S.Ct. 420, 87 L.Ed. 571.

in which the effectiveness of federal supervision awaits federal administrative regulation. The states are in those cases permitted to use their police power in the interval. However the conclusion must be otherwise where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of statute." ¹³⁷

Apart from this aspect of Congressional intention through statutory language that a state may or may not act, or having an agency enunciate such an intention, Congress may, and in the 1959 Labor-Management Reporting and Disclosure Act's amendments did, authorize the agency to play a jurisdictional accordion up to a certain point, namely, that statute froze the federal Labor Board's jurisdiction "under the standard prevailing upon August 1, 1959;" this required the Board to assert and take jurisdiction of all proceedings which it had accepted to then; as to others (those below, say, a required dollar minimum) the Board could, or need not, in its discretion, act; but § 14(c) (2) of the statute now permitted "any agency or the courts of any State or Territory" to assume and assert jurisdiction as to all those matters" over which the Board declines . . . to assert jurisdiction." ¹³⁸

§ 242. Conclusions

We can quote the Supreme Court to the effect that "It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it." ¹³⁹ What is involved is a practical adjustment of the inevitable federal-state conflict which earlier was seen in this Chapter. Whether exclusive or non-exclusive, whether in or affecting commerce, whether proscribed, preempted, or permitted, exactly what can be done and how should it be done? In a case holding invalid a state tax on all gasoline over twenty gallons carried in a car or truck, as an unreasonable burden on interstate commerce, Justices Black, Frankfurter, and Douglas dissented; regardless of the validity of their view, they did conclude with an admonition that is worth repeating here:

"Judicial control of national commerce—unlike legislative regulations—must from inherent limitations of the judicial process treat the subject by the hit and miss method of

137. *Bethlehem Steel Co. v. N. Y. S. L. R. B.*, *supra* note 47, at pp. 773-774.

139. *International Shoe Co. v. Washington* (1945) 326 U.S. 310, 315, 66 S.Ct. 154, 90 L.Ed. 95.

138. P.L. 86-257, 86th Cong., 73 Stat. 542.

deciding single local controversies upon evidence and information limited by the narrow rules of litigation. Spasmodic and unrelated instances of litigation cannot afford an adequate basis for the creation of integrated national rules which alone can afford that full protection for interstate commerce intended by the Constitution. We would, therefore, leave the questions raised by the Arkansas tax for consideration of Congress in a nation-wide survey of the constantly increasing barriers to trade among the States. Unconfined by 'the narrow scope of judicial proceedings' Congress alone can, in the exercise of its plenary constitutional control over interstate commerce, not only consider whether such a tax as now under scrutiny is consistent with the best interest of our national economy, but can also on the basis of full exploration of the many aspects of a complicated problem devise a national policy fair alike to the States and our Union. Diverse and interacting state laws may well have created avoidable hardships. . . . But the remedy, if any is called for, we think is within the ample reach of Congress." ¹⁴⁰

Nevertheless, despite the leaving of a policy-decision to Congress, and thereafter finding that body statutorily permitting the states to regulate and tax an interstate business, the Supreme Court has rejected a state's taxation of an out-of-state company having no contacts whatsoever with the state (save for the location of the insured property within it), for the Congressional legislative history disclosed the contrary.¹⁴¹

140. *McCarroll v. Dixie Greyhound Lines, Inc.* (1940) 309 U.S. 176, 188-189, 60 S.Ct. 504.

141. *State Bd. of Ins. v. Todd Shipyards Corp.* (1962) 370 U.S. 451, 82 S.Ct. 1380, 8 L.Ed.2d 620.

Chapter XI

OTHER FEDERAL LEGISLATIVE POWERS

§ 245. Introduction

A good many legislative powers have already been covered, beginning with Chapter I; there are, of course, innumerable powers which remain, especially those of an implied nature (§ 98). We examine briefly only those enumerated in Art. I, § 8, not already treated, and throughout the sections which follow the references to clauses are to those found there.

§ 246. The Express Powers—In General

It bears repetition that the so-called express or enumerated portions are not the sole Constitutional source for legislative power; we have already seen numerous other places where the Constitution and even the amendments grant express powers, e. g., most of the amendments since the Civil War contain a last section giving Congress power to enforce it by appropriate legislation; and there are sovereign and inherent powers which likewise grant undisclosed and undetermined powers. The particular express powers here set forth are therefore not to be confused as the total of the federal legislative powers, and most certainly not to be thought of as the total of the federal government's powers.

§ 247. — In Particular—Preliminary Caveat

The particular powers analyzed are not given in detail; it is desired merely to set them forth and present a summary of the judicial interpretation given and the limitations imposed; this enables a general knowledge of the scope of the legislative power to be obtained, and permits intensive examination to be undertaken as desired.

§ 248. — — The General Welfare Clause

In the first clause of Art. I, § 8 we find various powers, namely, those given in the Tax Clause, the Excise Clause, and the Common Defence Clause, and we also find the General Welfare Clause. Does this last clause itself provide a base or a source of power for Congressional legislation? In 1936 the first triple-A was denounced, although the government sought to uphold it by reliance upon several clauses; a majority of six Justices felt that the Tax Clause had to be read in conjunction with the General Welfare Clause, and that this latter qualified the former, i. e., "the only thing granted is the power to tax for the purpose of provid-

ing funds for payment of the nation's debts and making provision for the general welfare."¹ The court referred to the differences of opinion between Madison and Hamilton as to their respective limited or broad interpretations of the scope of the Tax Clause, and adopted that of the latter, namely, that this power was not qualified by or limited to the subsequent grants in clauses 2 on; nevertheless, continued the opinion, "the adoption of the broader construction leaves the power to spend [still] subject to limitations." Despite this approach the majority refused "to ascertain the scope of the phrase 'general welfare of the United States'" because they found another constitutional defect in the statute. The three dissenters agreed that "The Constitution requires that public funds shall be spent for a defined purpose, the promotion of the general welfare," and from this it would appear that a unanimous bench agreed that the General Welfare Clause is not an independent source of power but is a [broad] qualification upon the independent substantive power to spend.²

The following year two majorities sustained two Titles of the Social Security Act of 1935, in the first case upholding the unemployment tax provisions, and in the second upholding the payment of old age benefits and refusing to pass upon the separability of the tax provisions for this purpose.³ In the earlier case the opinion held that "the use of the moneys of the nation to relieve the unemployed and their dependents is [not] a use for any purpose narrower than the promotion of the general welfare," and in the next case adverted to the Madison-Hamilton dispute, felt that the first triple-A case had "settled" all this, but conceded that "difficulties are left" because "The line must still be drawn between one welfare and another, between particular and general The discretion [as to the placing of this

1. *United States v. Butler* (1936) 297 U.S. 1, 64 S.Ct. 312, 80 L.Ed. 477 (see also § 224, note 64, on this case). Preceding the text quotation the court said: "The view that the [General Welfare] clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted. Mr. Justice Story points out that if it were adopted 'it is obvious that under color of the generality of the words, to 'provide for the common defence and general welfare,' the government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers.'" The only limitation in the Constitution upon the tax power is in Art. I,

§ 9, that Congress lay no tax "on Articles exported from any State." See *State of New York v. United States* (1946) 326 U.S. 572, 66 S.Ct. 310, 90 L.Ed. 326.

2. The *Butler* case, *supra* note 1, at p. 83. Justice Stone wrote, Brandeis and Cardozo concurring.

3. *Steward Machine Co. v. Davis* (1937) 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279; *Helvering v. Davis* (1937) 301 U.S. 619, 57 S.Ct. 904, 81 L.Ed. 1307. On the same day these two cases were decided the court also upheld a state's unemployment compensation statute which fit into the federal scheme in the *Steward* case. *Carmichael v. Southern Coal & Coke Co.* (1937) 301 U.S. 495, 57 S.Ct. 868, 81 L. Ed. 1245.

line], however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." The conclusion was that "Congress did not improvise a judgment when it found that the award of old age benefits would be conducive to the general welfare."⁴ Thus Congress may enact a valid excise or duty upon the relation of employment, collect these for and as general treasury funds, and separately and annually legislate old age benefits; in other words, the tax and the spending may not alone be separable (even though the court refused to pass upon this), but without a tax the spending may be authorized, or without the spending the tax may be levied.⁵

§ 249. — — The Borrowing Clause

In clause 2 the Congress is given power to borrow "on the credit of the United States." During the Civil War paper money was issued, and it was made the legal tender for all debts, public and private; in 1870 these acts were held invalid as to debts contracted before enactment of the statute, but the court's reasoning could have been used as to subsequent debts; the following year the decision was reversed.⁶ A decade later such United States notes were upheld as legal tender in times of peace.⁷ In these cases no federal statute abrogated any gold payment clause in private or governmental bonds or contracts, but in 1933 a joint resolution of Congress so did. In a series of cases decided in 1935 the Supreme Court denounced this action but refused to permit any suits to be brought in effect permitting the government to eat its cake and yet to have it.⁸

4. *Helvering v. Davis*, supra note 3, at pp. 640 and 641.

5. See also Corwin, *The Spending Power of Congress—Apropos the Maternity Act*, 36 *Harv.L.Rev.* 548 (1923); Nicholson, *The Federal Spending Power*, 9 *Temple L.Q.* 3 (1934).

6. *Hepburn v. Griswold* (1870) 8 Wall. 603, 19 L.Ed. 513, *revsd.* in the *Legal Tender Cases* (1871) 12 Wall. 457, 20 L.Ed. 287. For the alleged politicking on this reversal, see Ratner, *Was the Supreme Court Packed by President Grant?*, 50 *Pol. Sci.Qtly.* 343 (1935), and Fairman, *Mr. Justice Bradley's Appointment*, etc., 54 *Harv.L.Rev.* 977, 1128 (1941).

7. *Julliard v. Greenman* (1884) 110 U.S. 421, 4 S.Ct. 122, 28 L.Ed. 204.

8. In *Norman v. Baltimore & Ohio R. R. Co.* (1935) 294 U.S. 240, 55

S.Ct. 407, 79 L.Ed. 885, a private gold payment clause was held not to impair the power of Congress to control the national money system, so that the private right of contract had to give way to the superior national power; in *Perry v. United States* (1935) 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912, and in *Nortz v. United States* (1935) 294 U.S. 317, 55 S.Ct. 428, 79 L.Ed. 907, a 1918 federal bond "payable in United States gold coin of the present standard of value," and a United States gold certificate payable in gold coin, were respectively involved; in both the power to borrow money was upheld as "an unqualified" one, and "vital to the government, upon which in an extremity its very life may depend." Thus the federal pledge could not be altered or destroyed. However, "the plaintiff has not shown, or attempted to show, that in rela-

§ 250. — — The Naturalization Clause

In clause 4 Congress is given power "To establish an uniform Rule of Naturalization." Prior to the ratification of the Constitution the state legislatures had enacted private naturalization laws, thereby enabling foreigners to become citizens of those states. After 1789 "the power of naturalization is exclusively in Congress," although delegations to state courts for this purpose were upheld.⁹ The constitutional basis for federal and state citizenship is today found in the 14th Amendment, § 1, first sentence, which states that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."¹⁰ Congress has codified its naturalization laws in 1952, declared who are citizens at birth, whether within or without the United States,¹¹ and then provided for the rejection or permissible entry into the country of foreigners, i. e., immigration,¹² the ouster of aliens, i. e., deportation,¹³ the naturalization of those eligible therefor,¹⁴ the

tion to buying power he has sustained any loss whatever." 294 U. S. at pp. 357-358. That same year Congress withdrew its consent to be sued in this type of case. 31 U. S.C.A. § 773b. See, for additional discussion, *Smyth v. United States* (1937) 302 U.S. 329, 58 S.Ct. 248, 82 L.Ed. 294, and *Guaranty Trust Co. v. Henwood* (1939) 307 U.S. 247, 59 S.Ct. 847, 83 L.Ed. 1266.

We do not go into the "exceptions" to the prohibition upon state issuance of money in Art. I, § 10, cl. 1, save to cite the upholding of state promises to pay, where not intended to circulate as money, *Poindexter v. Greenhow* (1885) 114 U.S. 270, 5 S.Ct. 903, 29 L.Ed. 185, and *Houston, etc. Ry. v. Texas* (1900) 177 U.S. 66, 20 S.Ct. 545, 44 L.Ed. 673, and the upholding of a federal tax on state notes designed to circulate as money. *Veazie Bank v. Fenno* (1869) 8 Wall. 533, 19 L. Ed. 482.

9. *Chirac v. Chirac* (1817) 2 Wheat. 259, 269, 4 L.Ed. 234, *Holmgren v. United States* (1910) 217 U.S. 509, 30 S.Ct. 588, 54 L.Ed. 861.

10. We discuss this in greater detail in Chaps. XVI and XVII, esp. §§ 356-361, 362. For the present, see *Murray v. The Charming Betsy* (1804) 2 Cr. 64, 119, 2 L.Ed. 208.

11. The Immigration and Nationality Act of June 27, 1952, 66 Stat. 235, 8 U.S.C.A. § 1401; as for na-

tionals of the United States, see § 1408.

12. "The authority of Congress over the general subject is plenary; it may exclude aliens altogether, or prescribe the terms and conditions upon which they may come into or remain in this country." *Lapina v. Williams* (1914) 232 U.S. 78, 88, 34 S.Ct. 196, 58 L.Ed. 515. See also *Knauff v. Shaughnessy* (1950) 338 U.S. 537, 70 S.Ct. 309, 94 L.Ed. 317, and also *Montgomery v. French* (8th Cir. 1962) 299 F.2d 730 for numerous citations and quotations, and pointing out that the determination of the naturalization officer, when acting within the scope of his authority, is final and non-appealable to the courts (save for internal appeals).

13. E. g., for becoming a member of, i. e., a "meaningful association" with, the Communist Party in violation of the Internal Security Act of 1950, as in *Niukkanen v. McAlexander* (1960) 362 U.S. 390, 80 S.Ct. 799, 4 L.Ed.2d 816, unless it was an innocent association, as in *Rowoldt v. Perfetto* (1957) 355 U. S. 115, 78 S.Ct. 180, 2 L.Ed.2d 140; for engaging in prostitution within three years after admission, *Keller v. United States* (1909) 213 U.S. 138, 29 S.Ct. 470, 53 L.Ed. 737; for failing to obtain a certificate of residence, *Fong Yue Ting*

14. See note 14 on page 246.

revocation of naturalization, i. e., denaturalization (and deportation) of naturalized citizens,¹⁵ and the loss of citizenship and nationality whether native-born or naturalized;¹⁶ the statute also provides for collective, as well as individual, naturalization.¹⁷ An alien in the United States enjoys certain treaty and statutory privileges superior to those of a citizen, and "in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen."¹⁸ The procedure for naturalization requires, in addition to residence, application, etc., an oath of allegiance¹⁹ which may provide the basis for a denaturalization and deportation proceeding.²⁰

v. United States (1893) 149 U.S. 698, 13 S.Ct. 1016, 37 L.Ed. 905.

14. A person may have a dual citizenship and may thus "have and exercise rights of nationality in two countries and be subject to the responsibilities of both." *Kawakita v. United States* (1952) 343 U.S. 717, 723-724, 72 S.Ct. 950, 96 L.Ed. 1249, giving numerous citations in fn. 2 at p. 723. Thus a person may be born abroad of American parents, or here of foreign parents, assuming subject to the country's jurisdiction, or be there or here naturalized, and have a dual citizenship.

15. 8 U.S.C.A. § 1451, with several subdivisions. Where fraud is alleged the subjective quality of intent may be involved, and denaturalizations may be refused, as in *Schneiderman v. United States* (1945) 320 U.S. 118, 63 S.Ct. 1333, 87 L.Ed. 1796, or granted, as in *Knauer v. United States* (1946) 328 U.S. 654, 66 S.Ct. 1304, 90 L.Ed. 1504, all depending upon the view taken by the Justices. The government must sustain a heavy burden of proof, as in *Schneiderman*, *supra*.

16. 8 U.S.C.A. § 1481. See, e. g., *Perez v. Brownell* (1958) 356 U.S. 44, 78 S.Ct. 568, 2 L.Ed.2d 603 (native-born national held to have lost his citizenship because he voted in a foreign political election). Under § 1491(a) (8) a deserter in time of war loses his nationality; a similar provision in the 1940 statute was held unconstitutional by five Justices in *Trop v. Dulles* (1958) 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630. Under subd. (10) a draft evader is likewise so treated,

but the constitutionality of the subdivision is as yet undecided. *Mackey v. Mendoza-Martinez* (1960) 362 U.S. 384, 80 S.Ct. 785, 4 L.Ed. 2d 812.

17. See, e. g., *Boyd v. Nebraska* (1892) 143 U.S. 135, 162, 12 S.Ct. 375, 36 L.Ed. 103: "Instances of collective naturalization by treaty or by statute are numerous."

18. *Harisiades v. Shaughnessy* (1952) 342 U.S. 580, 586, 72 S.Ct. 512, 96 L.Ed. 586, giving footnote references and citations as to superiorities, equalities, and inferiorities, and upholding deportations as against defences of violations of due process of law, first amendment freedoms and the Ex Post Facto Clause. See also *Galvan v. Press* (1954) 347 U.S. 522, 529, 530, 74 S.Ct. 737, 98 L.Ed. 911, and *Fleming v. Nestor* (1960) 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (upholding constitutionality of § 202(n) of the Social Security Act which denied payments to an alien deported because of Communist Party membership).

19. In *Girouard v. United States* (1946) 328 U.S. 61, 66 S.Ct. 826, 90 L.Ed. 1048, the court admitted a conscientious objector to citizenship, and overruled three prior cases which had denied naturalization where the oath was sought to be qualified, or a pacifist or non-combatant was involved, feeling this was now the intent of Congress.

20. E. g., *supra* note 15, and *Baumgartner v. United States* (1944) 322 U.S. 665, 64 S.Ct. 1240, 88 L.Ed. 1525 (denaturalization reversed because the government had not sus-

§ 251. — — The Bankruptcy Clause

In clause 4 Congress is also given power to “establish . . . uniform Laws on the subject of Bankruptcy throughout the United States.” This is a plenary power and, since 1898, Congress has excluded state laws from this area.²¹ The bankruptcy laws cover all individuals, associations, persons and corporations, and even municipal corporations,²² and its scope has broadened to include not alone benefits to and for creditors, but also to provide a degree of rehabilitation for the debtors.²³ However, this power is subject to the limitations of the 5th Amendment’s Due Process Clause where there is a taking of property without just compensation,²⁴ although contract-impairment limitations necessarily do not apply, and a political subdivision of a state, with the latter’s consent, may seek the statute’s protection.²⁵ Since Congress exercises a plenary power and its intent controls, a federal district judge, sitting in bankruptcy, may therefore not order abandonment of certain railroad passenger stations in disregard of state laws, for “Congress gave no such power,” although in another case it was held that Congress did intend to void all state foreclosure proceedings after a federal petition was filed, even though the proceedings were far advanced.²⁶ Not all state laws within the overall bankruptcy area are invalid, for example, a statute governing fraudulent transfers was upheld, as was a law providing that a bankruptcy discharge could not prevent a suspension of a driver’s license where he failed to pay a judgment which resulted from his negligent operation of his automobile.²⁷

tained the burden of proof). On 1st Amendment freedoms of religion, speech, association, etc. in connection with exclusion, naturalization and deportation, see § 329.

21. Bankruptcy Act, c. 541, 30 Stat. 544, thereby preventing state laws even though not in conflict, previously upheld in *Sturges v. Crowninshield* (1819) 4 Wheat. 122, 4 L.Ed. 529, *Ogden v. Saunders* (1827) 12 Wheat. 213, 6 L.Ed. 606.
22. See the *Bekins* case, *infra* note 25.
23. E. g., *In re Reiman* (1874) Fed. Cas.No.11,673, approved in *Continental Illinois National Bank, etc. v. Chicago, R. I. & P. R. R. Co.* (1935) 294 U.S. 648, 672, 55 S.Ct. 595, 79 L.Ed. 1110.
24. *Louisville Joint Stock Land Bank v. Radford* (1935) 295 U.S. 555, 55 S.Ct. 854, 79 L.Ed. 1593.
25. *Kuchner v. Irving Trust Co.* (1937) 299 U.S. 445, 57 S.Ct. 298, 81 L.Ed. 340, *United States v. Bekins* (1938) 304 U.S. 27, 58 S.Ct. 811, 82 L.Ed. 1137, the new statute there upheld overcoming the defects found in the old one by *Ashton v. Cameron County Water Improvement Dist.* (1936) 298 U.S. 513, 56 S.Ct. 892, 80 L.Ed. 1309.
26. *Palmer v. Massachusetts* (1939) 308 U.S. 79, 60 S.Ct. 34, 84 L.Ed. 93; *Kalb v. Feuerstein* (1940) 308 U.S. 433, 60 S.Ct. 343, 84 L.Ed. 371.
27. *Stellwagen v. Clum* (1918) 245 U.S. 605, 615, 38 S.Ct. 215, 62 L. Ed. 507; *Reitz v. Mealey* (1941) 314 U.S. 33, 62 S.Ct. 24, 86 L.Ed. 21, and see also *Kesler v. Utah* (1962) 269 U.S. 153, 82 S.Ct. 807, 7 L.Ed.2d 641, a 5-3 decision, upholding a like Utah law against a charge that the state was “using its police power as a devious collection agency under the pressure of organized creditors.”

§ 252. — — The Coinage Clause

Clause 5 grants Congress power to coin money, regulate its value and that of foreign coin, and also to fix the standard of weights and measures. This coinage clause has been construed broadly,²⁸ and not alone may Congress create its own bank for these purposes, but since Art. I, § 10, cl. 1 additionally denies states the right to coin money, the federal legislature may now tax and thereby restrain state notes. We have also seen that Congress may go off the gold standard, abrogate private or in effect governmental clauses calling for payment in gold, and otherwise control the currency as it deems necessary. The combination of the Tax Clause (cl. 1) and the Borrowing Clause (cl. 2) with this Coinage Clause, especially when used in conjunction with the Necessary and Proper Clause (cl. 18, see § 259, *infra*), has provided a solid base for the judicial upholding of several exercises of Congressional power, e. g., the bank and the legal tender cases. But the Gold Clause Cases of 1935 disclosed that the Borrowing Clause could not be limited or overruled by the Coinage Clause, eight Justices rejecting the Congressional repudiation of a federal gold payment bond but holding the claimant had not proved damages.²⁹

§ 253. — — The Postal Clause

Under cl. 7 Congress has power "To establish Post Offices and post Roads," and by "establish" is included the power to build.³⁰ This is a broad power, and to be protected,³¹ for under it, for example, or in conjunction with another power: a state toll tax on its roads was denounced when applied to the mails; a state's licensing requirements for mail truck drivers was likewise denounced, although these drivers must obey reasonable traffic regulations; a federal injunction was obtained against union interference with the transmission of the mails; circulars advertising lotteries were excluded; reasonable regulations concerning the use of the postal facilities were upheld; and magazines of poor taste and vulgarity may be refused second-class mailing privileges.³² The postmaster's power to exclude from the mails ex-

28. Under cl. 6 Congress is given the power to punish counterfeiting, but even without this superfluous grant the power would exist. See, e. g., *United States v. Marigold* (1850) 9 How. 560, 568, 13 L.Ed. 257.

29. See § 249, note 8, *supra*.

30. *Kohl v. United States* (1876) 91 U.S. 367, 23 L.Ed. 449. It was not until this case so held that disputes as to such power were ended.

31. See, e. g., *Ex parte Jackson* (1878) 96 U.S. 727, 24 L.Ed. 877, and discussion in *Ex parte Yarbrough* (1884) 110 U.S. 651, 658-659, 4 S.Ct. 152, 28 L.Ed. 274.

32. *Searight v. Stokes* (1845) 3 How. 151, 169, 11 L.Ed. 537; *Johnson v. Maryland* (1920) 254 U.S. 51, 41 S.Ct. 16, 65 L.Ed. 126; *In re Debs* (1895) 158 U.S. 564, 599, 15 S.Ct. 900, 39 L.Ed. 1092; *Ex parte Jackson*, *supra* note 31, at p. 732;

tends to seditious or obscene matter, information on birth control, that which tends to incite murder, assassination, or arson, fraudulent matter and libelous material on envelopes.³³ Nevertheless, "Congress may not exercise its control over the mails to enforce a requirement which lies outside its constitutional province,"³⁴ and constitutional protections, e. g., freedom of speech, no unreasonable searches and seizures, apply.³⁵

§ 254. — — The Patent and Copyright Clauses

In clause 8 Congress is given the power to confer patents and copyrights for limited periods of time, although nowhere in the clause are these two terms found. Both fields are highly technical, scientifically and legally, literarily and judicially, and we do not enter their labyrinthian maze. It suffices to point out, with respect to patents, that the clause gives to "Inventors" a limited, exclusive right to their "Discoveries," but this relates not to the discovery of an unknown law of nature but to its application "to a new and useful end."³⁶ Apparently the touchstone is "genius," for numerous decisions refer to this term, generally in conjunction with a descriptive adjective, e. g., inventive genius.³⁷ While com-

reasonable regulations upheld as to fraud, *Donaldson v. Read Magazine* (1948) 333 U.S. 178, 68 S.Ct. 591, 92 L.Ed. 628, as to information required from second class users, *Lewis Publishing Co. v. Morgan* (1913) 229 U.S. 288, 316, 33 S.Ct. 867, 57 L.Ed. 1190; *Hannegan v. Esquire, Inc.* (1946) 327 U.S. 146, 155, 66 S.Ct. 456, 90 L.Ed. 586; *Manual Enterprises, Inc. v. Day* (1962) 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639, reversing *P. M. G.'s* closing of mails to magazine (but not because itself obscene). See also § 401, *infra*.

33. For a brief discussion, see *Emerson & Haber, Political and Civil Rights in the United States* (1952) pp. 621-624.

34. *Electric Bond & Share Co. v. S. E. C.* (1938) 303 U.S. 419, 442, 58 S.Ct. 678, 82 L.Ed. 936.

35. See, e. g., dissent of Holmes with Brandeis concurring, in *Leach v. Carlile* (1922) 258 U.S. 138, 140-141, 42 S.Ct. 227, 66 L.Ed. 511, and also in *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson* (1921) 255 U.S. 407,

421-423, 430-432, 437-438, 41 S.Ct. 352, 65 L.Ed. 704. In the *Esquire* case, *supra* note 32, at p. 160, Justice Frankfurter's concurrence agreed with the Leach dissent "so far as sealed letters are concerned," but a different set of conditions presented different questions on other forms of mail; Douglas' opinion, at p. 156, alluded to the *Milwaukee Case* and said "grave constitutional questions are raised" where use of the mails is held solely a privilege.

36. *Funk Bros. Seed Co. v. Kalo Co.* (1948) 333 U.S. 127, 130, 68 S.Ct. 440, 92 L.Ed. 588. In general, as to the English background and the American experience, see *Forbosch, Economics of American Patent Law*, 17 N.Y.U.L.Q.Rev. 157, 406 (1940), and also *Licensee Estoppel in Patent Law*, 20 Temple L.Q. 515 (1947).

37. *Mantle Lamp Co. v. Aluminum Co.* (1937) 301 U.S. 544, 546, 57 S.Ct. 837, 81 L.Ed. 1277, see also *Cuno Corp. v. Automatic Devices Corp.* (1941) 314 U.S. 84, 91, 62 S.Ct. 37, 86 L.Ed. 58.

binations of devices are patentable, it is "only when the whole in some way exceeds the sum of its parts" that it is upheld.³⁸ The granting of a patent confers an exclusive right which cannot be appropriated or used by private persons without payment, or by the government without just compensation.³⁹ A patentee cannot misuse his grant so as, for example, to violate the antitrust laws.⁴⁰

§ 255. — — The Piracy Clause

Clause 10 does not give Congress power to commit or engage in piracy, but "To define and punish Piracies and Felonies committed on the High Seas, and Offences against the Law of Nations." As to this last phrase, the Congress will not undertake to define or codify international law, so that a statute is upheld even though it punished "the crime of piracy, as defined by the law of nations,"⁴¹ although a crime defined in detail and with particularity, while not referring to this clause, is also upheld.⁴² This clause is the only source for extra-territorial federal jurisdiction, and taken in conjunction with the powers granted in the Judiciary Article enable the legislative and judicial branches to act where the vessels are not only on the high seas, but at anchor in foreign territorial waters.⁴³

§ 256. — — The War Clauses

The War Clauses comprise clauses 11–16, for although 11–14 gives to Congress the power to declare war, raise and support armies and a navy, and make rules and regulations for the armed forces, cl. 15 also gives it power to call "forth the Militia to . . . repel Invasions," and cl. 16 gives it power to organize, train, and discipline such Militia and to use them as part of the federal forces. There is far too much which comes under the war power of the Congress and the President, and we have already made the point that it is primarily a peacetime Constitution we study. For in time of war, whether declared by Congress or as a fact when another nation attacks us or openly declares war upon

38. *Great A. & P. Tea Co. v. Supermarket Equipment Corp.* (1950) 340 U.S. 147, 152, 71 S.Ct. 127, 95 L.Ed. 162. A concurring opinion rejected the patenting of "gadgets" and set forth a list of "incredible patents which the Patent Office has spawned." At pp. 156–158.

39. *James v. Campbell* (1882) 104 U.S. 356, 358, 65 S.Ct. 387, 89 L.Ed. 363.

40. See *Forkosch*, *supra* note 36, and also *United States v. New Wrinkle, Inc.* (1952) 342 U.S. 371, 72 S.Ct. 350, 96 L.Ed. 417.

41. *United States v. Smith* (1820) 5 Wheat. 153, 160, 5 L.Ed. 57. See also *Ex parte Quirin* (1942) 317 U.S. 1, 27, 28, 63 S.Ct. 1, 87 L.Ed. 3.

42. *United States v. Arizona* (1887) 120 U.S. 487, 7 S.Ct. 628, 30 L.Ed. 728.

43. *United States v. Furlong* (1820) 5 Wheat. 184, 200, 5 L.Ed. 57, *United States v. Flores* (1933) 289 U.S. 137, 149–152, 53 S.Ct. 580, 77 L.Ed. 1086.

us, the human and natural resources of the nation are mobilized, and all persons and property are subject to the necessity of victory. Thus selective service is upheld, as are price and rent controls, and a host of regulations and executive orders are supported because of necessity; even the 3rd Amendment differentiates between peacetime and wartime quartering of soldiers in homes, and peacetime freedoms are circumscribed without objection by the judiciary. These clauses make the nation a unit for war, brook little interference during its conduct, and, as with Cincinnatus under the Roman procedure, retire when the victory is won.⁴⁴

§ 257. — — The District of Columbia Clause

Congress is given power, by virtue of clause 17, "To exercise exclusive Legislation in all Cases whatsoever, over" the District of Columbia.⁴⁵ Since 1800 such exclusive jurisdiction has been exercised,⁴⁶ and in 1876 the present form of government was created. This enables a Congressional committee to superintend

44. See, e. g., *Cities Service Co. v. McGrath* (1952) 342 U.S. 330, 72 S.Ct. 334, 96 L.Ed. 359; *Lichter v. United States* (1848) 334 U.S. 742, 749, 778-783, 68 S.Ct. 1294, 92 L.Ed. 694; *Duncan v. Kahana-moku* (1946) 327 U.S. 304, 66 S.Ct. 606, 90 L.Ed. 688; *Ex parte Endo* (1944) 323 U.S. 283, 65 S.Ct. 208, 89 L.Ed. 243; *Bowles v. Willingham* (1944) 321 U.S. 503, 519, 64 S.Ct. 641, 88 L.Ed. 892; *Yakus v. United States* (1944) 321 U.S. 414, 424, 64 S.Ct. 660, 88 L.Ed. 834; *Hirabayashi v. United States* (1943) 320 U.S. 81, 91-92, 104, 63 S.Ct. 1375, 87 L.Ed. 1774; *United States v. Bethlehem Steel Corp.* (1942) 315 U.S. 289, 305, 62 S.Ct. 581, 86 L.Ed. 855; *Ashwander v. T. V. A.* (1936) 297 U.S. 288, 327-328, 56 S.Ct. 466, 80 L.Ed. 688.

Although war grants much of a power's exercise not ordinarily permitted in peacetime this does not mean that Constitutional limitations do not apply. "But even the all-embracing power and duty of self-preservation is not absolute. Like the war power, which is indeed an aspect of the power of self-preservation, it is subject to applicable constitutional limitations. . . . Our Constitution has no provision lifting restrictions upon governmental authority during pe-

riods of emergency, although the scope of a restriction may depend on the circumstances in which it is invoked. The First Amendment is such a restriction." Justice Frankfurter, concurring in *Dennis v. United States* (1951) 341 U.S. 494, 520, 71 S.Ct. 857, 95 L.Ed. 1937.

45. Originally the District embraced Alexandria County, ceded by Virginia, but in 1846 Congress authorized a referendum to determine if its inhabitants desired to return, they so voted, and Virginia immediately assumed jurisdiction without any further action by Congress. Although in 1876 the Supreme Court termed this "a violation of the Constitution," it held a county resident estopped from challenging it because of Congressional recognition of the fact. *Phillips v. Payne* (1876) 92 U.S. 130, 23 L.Ed. 649.

46. The federal government may exercise the power of eminent domain notwithstanding any limitation contained in the cessions by Maryland and Virginia, *Shoemaker v. United States* (1893) 147 U.S. 282, 299, 13 S.Ct. 361, 37 L.Ed. 170, and all other rights of dominion. *United States ex rel. Greathouse v. Dern* (1933) 289 U.S. 352, 354, 53 S.Ct. 614, 77 L.Ed. 1250.

affairs, through an executive board of commissioners⁴⁷ appointed by the President, with the District being a municipal corporation with power to sue and be sued as such.⁴⁸ The District is considered to be a state⁴⁹ for, e. g., taxes⁵⁰ and diversity jurisdiction,⁵¹ its residents are entitled to the rights of other federal citizens,⁵² and it is analogized to a state with respect to any police powers exercised by Congress over it,⁵³ and with respect to its own court system.⁵⁴ The 23rd Amendment enables District inhabitants, in accordance with Congressional direction, to vote for electors for President and Vice-President.

§ 258. — — The Authority Over Places Purchased Clause

The second portion of clause 17 gives Congress power to exercise legislation "over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." The clause is broadly construed so that it covers post-office buildings, hospitals and hotels in national parks, and locks and dams to improve navigation,⁵⁵ but not lands acquired for flood control, forests, etc., although Congress may exercise exclusive or qualified jurisdiction for purposes other than found

47. They are administrative officials only and cannot exceed their statutory powers, *District of Columbia v. Bailey* (1898) 171 U.S. 161, 18 S. Ct. 868, 43 L.Ed. 118, but have all powers which are local in character.

48. *Metropolitan Ry. Co. v. District of Columbia* (1889) 132 U.S. 1, 9, 10 S.Ct. 19, 33 L.Ed. 231.

49. However, under the Extradition Clause in Art. IV, § 2, cl. 2, the District is not considered a state, so that no demand need be made upon the Governor of another State because Congress has national power to apprehend a fleeing criminal. *Cohens v. Virginia* (1821) 6 Wheat. 264, 428, 5 L.Ed. 257.

50. For national purposes, *Loughborough v. Blake* (1820) 5 Wheat. 317, 5 L.Ed. 98; for District (state) purposes only, *Gibbons v. District of Columbia* (1886) 116 U.S. 404, 408, 6 S.Ct. 427, 29 L.Ed. 680.

51. *National Mutual Ins. Co. v. Tidewater Transfer Co., Inc.* (1949) 337 U.S. 582, 69 S.Ct. 1173, 93 L. Ed. 1536, a 5-4 decision sustaining a statute conferring such jurisdiction, discussing earlier cases, and

holding the District not to be a state.

52. E. g., trial by jury, presentment, *United States v. Moreland* (1922) 258 U.S. 433, 42 S.Ct. 368, 66 L.Ed. 700, *Callan v. Wilson* (1888) 127 U.S. 540, 8 S.Ct. 1301.

53. *Wright v. Davidson* (1901) 181 U.S. 371, 384, 21 S.Ct. 616, 45 L. Ed. 900.

54. *Keller v. Potomac Electric Power Co.* (1923) 261 U.S. 428, 43 S. Ct. 445, 67 L.Ed. 731, *Jordan v. American Eagle Fire Ins. Co.* (App. D.C.1948) 169 F.2d 281, although the Court of Appeals for the District is held to be an Art. III court, and the judgments of the district courts stand on the same footing as state court judgments. *O'Donoghue v. United States* (1933) 289 U.S. 516, 53 S.Ct. 740, 77 L.Ed. 1356, *Embry v. Palmer* (1883) 107 U.S. 3, 2 S.Ct. 25, 27 L.Ed. 346.

55. *James v. Dravo Contracting Co.* (1937) 302 U.S. 134, 143, 58 S.Ct. 208, 82 L.Ed. 155, *Battle v. United States* (1908) 209 U.S. 36, 28 S.Ct. 422, 52 L.Ed. 670, *Arlington Hotel Co. v. Fant* (1929) 278 U.S. 439, 49 S.Ct. 227, 73 L.Ed. 447.

in the clause where a state so conveys.⁵⁶ The exclusive jurisdiction of Congress extends to the punishment for crimes committed on such lands, to taxation, and to the inability of a state to legislate thereon.⁵⁷

§ 259. — — The Necessary and Proper Clause

This clause has already been discussed in §§ 14 and 162, as well as in 96–101, and its repetition here is primarily for emphasis. Before the famous Bank Case of 1819, in which Marshall upheld the power of Congress to charter a national bank, he had stated that the federal government “must be authorized to use the means which appear to itself most eligible to effect” the object and powers entrusted to it.⁵⁸ The clause does not limit itself to the effectuation of the seventeen “foregoing Powers” granted to Congress, but also grants such “necessary and proper” ability to effectuate “all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof,” e. g., enact all laws necessary to effectuate federal court judgments.⁵⁹

56. *Collins v. Yosemite Park Co.* (1938) 304 U.S. 518, 530, 528, 58 S. Ct. 1009, 82 L.Ed. 1502, A state may condition its conveyance, convey for a limited time or purpose, or otherwise seek to convey less than the entirety. *James v. Dravo Contracting Co.*, supra note 55, at p. 145. See also *S. R. S., Inc. v. Minnesota* (1946) 327 U.S. 558, 564, 66 S.Ct. 749, 90 L.Ed. 851, involving governmental abandonment of property for governmental purposes, ceded it unconditionally, and the successful effort of Minnesota to tax a private purchaser from the government.

Of course a state's conveyance is not effective until the federal government accepts. *Silas Mason Co. v. Tax Commission of Washington* (1937) 302 U.S. 186, 58 S.Ct. 233, 82 L.Ed. 187.

57. *Battle v. United States* (1908) 209 U.S. 36, 28 S.Ct. 422, 52 L.Ed. 670; *Johnson v. Yellow Cab Co.* (1944) 321 U.S. 383, 64 S.Ct. 622, 88 L.Ed. 814; *Surplus Trading Co. v. Cook* (1930) 281 U.S. 647, 50 S. Ct. 455, 74 L.Ed. 1091; *Western Union Telegraph Co. v. Chiles* (1909) 214 U.S. 274, 29 S.Ct. 613, 53 L.Ed. 994; *Pacific Coast Dairy Co. v. Department of Agriculture* (1943) 318 U.S. 285, 63 S.Ct. 628, 87 L.Ed. 761, although existing state laws protecting private rights continue until superseded by Congress, *James Stewart & Co. v. Sadrakula* (1940) 309 U.S. 94, 60 S.Ct. 439, 84 L.Ed. 596.

58. *United States v. Fisher* (1805) 2 Cr. 358, 396, 2 L.Ed. 304.

59. *Bank of United States v. Halstead* (1825) 10 Wheat. 51, 53, 6 L. Ed. 264.

Chapter XII

THE FEDERAL POLICE POWER

§ 265. Introduction

The "police power" is a term of legal art. It should not be confused with the tax or war powers of the federal government, or with any of its other powers; further, an immediate distinction is required between the police powers of the federal government (examined in this chapter) and those of a state (Chapter XIII). In discussing a state's police powers some measure of understanding of this term is possible. Here we in effect assume a tentative understanding of the term and discuss not only the federal police power but also some limitations upon it, as well as the manner in which the national government uses its several powers to effectuate the state's police power.

§ 266. The Existence of a Police Power

Holmes called the police power a method of "petty larceny," and termed it an "apologetic phrase," that is, "to apologize for the general power of the legislature to make a part of the community uncomfortable by a change."¹ In short, he felt that it was a queasy phrase, designed to make palatable a dose of legislative power administered to a private patient. Instead of defining it, Holmes felt we should concede that "a power existed, and let it go at that; when the courts uphold legislation they should do so without having to invent justifying phrases or making a determination on a basis other than that a reasonable balancing of private interests, including the public's where appropriate, supports the action. This approach is highly practical, looks at the facts under which we live, and does not condone euphemisms. Nevertheless, the police power is the legalistic term applied to the concept, and so long as it does not becloud the understanding of the actualities there is no reason why it may not be used." Whether we accept Holmes' view on the existence of power, without giving

1. Holmes-Laski *Letters* (1953) I, 457; dissenting in *Tyson & Bro. v. Banton* (1927) 273 U.S. 418, 445-446, 47 S.Ct. 426, 71 L.Ed. 718. He felt that it was a phrase "convenient, to be sure, to conciliate the mind to something that needs explanation; the fact that the constitutional requirement of compen-

sation when property is taken cannot be pressed to its grammatical extreme; that property rights may be taken for public purposes without pay if you do not take too much;" At pp. 445-446. Justice Brandeis concurred in this opinion.

it a name,² or determine to call this general and undefined type of power a "police" one, the legal fact is that a government has a "sort" or "reservoir" of powers, or an ability to do things, which is unaffected by limitations ordinarily applying.

§ 267. — In the Federal Government

If Taney's view is correct, that the police powers "are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions,"³ then the nation, as a government, has such an "inherent" power. But Brandeis later wrote for a court which included Holmes, "That the United States lacks the police power, and that this was reserved to the states by the 10th Amendment, is true."⁴ This stems from a construction which premises its view upon the granting or distribution theory, that is, that the Founding Fathers, through the people, granted certain powers to the federal government, or else distributed all sovereign powers between the federal and the state governments, and that included in those which the federal obtained was no such police power. But we have seen that the Commerce Clause is such a vital source of federal power that it enables the national government to do many things; so too do the postal, tax, and other powers, and especially the war power.⁵ Thus, to quote Brandeis still further, "But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incident which attend the exercise by a state of its police power, or that it may tend to accomplish a similar purpose."⁶ We may therefore proceed on the basis that, at least by analogy to a state's police power, the federal government does exercise some power which is not one of its granted, implied, or inherent powers; further, that it must

2. "I do not believe in such apologies. I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the state" *Ibid.*, at p. 446.

3. *The License Cases* (1847) 4 How. 504, 584, 12 E.D. 256. He was speaking of a state's powers.

4. *Hamilton v. Kentucky Distilleries & Warehouse Co.* (1919) 251 U.S. 146, 156, 40 S.Ct. 106, 64 L.Ed. 194.

5. See, e. g., the series of articles by Professor Cushman, *The National Police Power Under the Commerce Clause of the Constitution*, 3 Minn.

L.Rev. 289, 381, 452 (1919), *The National Police Power Under the Taxing Clause of the Constitution*, 4 id. 247 (1920), and *The National Police Power Under the Postal Clause of the Constitution* 4 id. 402 (1920), suggesting the use of the term "national police power."

6. *The Kentucky Distilleries case*, supra note 4. In *United States v. Shauver* (E.D.Ark.1914) 214 Fed. 154, 156, the court felt it to be "equally well settled that the United States does possess what is analogous to the [state's] police power, which every sovereign nation possesses . . . to carry into effect those powers which the Constitution has conferred upon it."

either be an independent power (negatived by Brandeis) or else a resulting power (§ 99); and since it is this latter which is more palatable legally and constitutionally, we may conclude that the federal government does have or at least exercises a resulting police power.⁷

§ 268. — — Over the District of Columbia

We have seen that Congress acts like a state legislature or government over the District of Columbia, and that its powers are likewise those of a state over its territory and inhabitants. Insofar as the seat of government is thus to be treated as a state, Congress does have and does exercise a police power over it. This conclusion is Holmes', despite his later views given above, for in 1921, in a case involving a local rent control law, he upheld the legislation on the basis of the police power, specifically referring to this term several times.⁸

§ 269. Constitutional Clauses Supporting Federal Police Powers —In General

"It follows, then, that if Congress is to exercise a police power at all it must do so by a process something akin to indirection: that is, by using the powers which are definitely confided to it, for the purposes of the police power."⁹ In other words, there should (not must, in this writer's opinion) be a definite power, such as one of the enumerated or implied ones, before the use of this power may become analogized to what in the states could be called a police power. What are these definite powers, and how may they be so used? A few clauses are discussed, but this does not intimate that all of the clauses in the Constitution may be so used.

§ 270. — In Particular—The Commerce Clause

In our analysis of interstate commerce in Chapter X we saw that many statutes were passed by Congress which involved physi-

7. On the inability of the federal government to contract away this power, or be bound by the contracts of private persons, see §§ 289-290, *infra*.

8. *Block v. Hirsch* (1921) 256 U.S. 135, 155-156, 41 S.Ct. 458, 65 L.Ed. 865.

9. Cushman, Commerce Clause, *supra* note 5, at p. 291. He continues: "If it would enter upon an ambitious program to protect public morals or safety or health or to promote good order, it must cloak

its good works under its authority to tax, or to regulate commerce, or to control the mails, or the like, and say, 'By this authority we pass this law in the interest of the public welfare.' In short, Congress exercises a generous police power not because that power is placed directly in its hands but because it has the power to regulate commerce, to lay taxes, and to control the mails, and uses that authority for the broad purposes of the general welfare."

cal safety regulation, particularly upon railroads and carriers; in addition, this clause was used to control or enact statutes on or concerning hours of labor, agricultural commodities, manufacturing, employers' liability, economic restraints, i. e., antitrust acts, labor disputes, labor-management relations, etc. So, too, when this commerce power is used to forbid commerce or traffic in gambling equipment, harmful or adulterated foods, drugs, lottery tickets, obscene matter (the postal power here is also involved), the so-called white slave traffic, securities and stock market frauds, and like matters, there is no question but that the health, safety, and morals of the national public are being protected.¹⁰ It is no longer necessary that this power be "limited to articles which in themselves have some harmful or deleterious property," so that the use of the Commerce Clause today reaches not alone that which is "harmful or deleterious," but also all else which is felt to require a degree of regulation or control by Congress through this power.¹¹ The power over foreign commerce similarly gives Congress the use of such a police power, e. g., requiring the owner of a vessel on which alien seamen, suffering from specified diseases, are brought into the country, to bear the expense of their care.¹²

§ 271. — — The Tax Clause

The general use of the tax power is to provide funds for a variety of purposes, e. g., those found in the clauses in Art. I, § 8, cl. 1, but its particular use may involve aspects of the police power. For example, the taxing of state notes or currency, in order to drive it out of the market and thereby protect the federal power, illustrates a procedural use of the tax clause in aid of another federal substantive power, and, as Justice Miller said, this method "was not subject, therefore, to the rules which would invalidate an ordinary tax pure and simple."¹³ So the power supported an oleomargarine tax, one upon opium smoking, and another upon the manufacture of matches made from poisonous

10. See, e. g., for illustrations, *Cushman*, *Commerce*, *supra* note 5, at pp. 303-319, and see in addition, *Hoke v. United States* (1913) 227 U.S. 308, 33 S.Ct. 281, 57 L.Ed. 523 (white slavery); *Frisbie v. United States* (1895) 157 U.S. 160, 165, 15 S.Ct. 586, 39 L.Ed. 657 (attorney demanding more than statutory \$10 for pension services); *N. L. R. B. v. Jones & Laughlin Steel Corp.* (1937) 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (labor relations act).

11. *United States v. F. W. Darby Lumber Co.* (1941) 312 U.S. 100,

103, 61 S.Ct. 451, 85 L.Ed. 614, upholding the Fair Labor Standards Act of 1938.

12. *United States v. New York & Cuba Mail S. S. Co.* (1925) 269 U.S. 304, 46 S.Ct. 114, 70 L.Ed. 281.

13. In the *Head Money Cases* (1884) 112 U.S. 580, 596, 5 S.Ct. 247, 28 L. Ed. 798, commenting on *Veazie Bank v. Fenno* (1869) 8 Wall. 533, 19 L.Ed. 482. See also *Merchants' National Bank v. United States* (1879) 101 U.S. 1, 6, 25 L.Ed. 979.

phosphorous, and the debates in Congress disclosed the real intent to be control, not revenue, e. g., "The real purpose of the [phosphorous matches] bill is to destroy an industry that ought to be destroyed."¹⁴ The tax power may also be used for many other purposes, e. g., to regulate the sale or possession of narcotics, the dealing in firearms, speculating in grain futures, and to provide for the general welfare of the people as in supporting social security laws.¹⁵

§ 272. — — The Postal Clause

The treatment of the postal power in § 253 has disclosed its use in the area of regulating and controlling for police power purposes. It is almost self-evident that, aside from the power and the ability of Congress or the President to protect the use of the mails, they may also protect the people from the abuse of the mails. For example, to protect the mails the federal government may require safety devices on carriers, or exclude dangerous articles therefrom, such as "liquids, poisons, explosives, and inflammable articles, fatty substances, or live or dead animals, and substances which exhale a bad odor."¹⁶ Or, to protect the public, the government may exclude obscene literature, lottery tickets, fraudulent matter, seditious and treasonable publications, etc.¹⁷

§ 273. — — The Naturalization Clause—Immigration and Deportation

Under the analysis of the federal government's immigration and deportation powers (§ 250) we saw that undesirables, e. g., criminals, were not permitted into the country, and that others were deported who engaged in prostitution, rackets, and other types and forms of crime. In other words, the Naturalization Clause permits the federal government to exercise a superintending power over aliens, and even naturalized citizens, within the country, and by the threat of deportation compel them to be or remain "good".

14. Quoted by Cushman, Tax, *supra* note 5, at p. 267.

15. *United States v. Doremus* (1919) 249 U.S. 86, 39 S.Ct. 214, 63 L.Ed. 493 (violation of the narcotics tax act), followed in *Nigro v. United States* (1928) 276 U.S. 332, 48 S.Ct. 388, 72 L.Ed. 600; *Sozinsky v. United States* (1937) 300 U.S. 506, 57 S.Ct. 554, 81 L.Ed. 772 (excise tax from dealers in firearms); Board of

Trade v. Olsen (1923) 262 U.S. 1, 43 S.Ct. 470, 67 L.Ed. 839 (grain futures); *Steward Machine Co. v. Davis* (1937) 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279 (social security).

16. *Public Clearing House v. Coyne* (1903) 194 U.S. 497, 507, 24 S.Ct. 789, 48 L.Ed. 1092.

17. See, e. g., Cushman, Postal, *supra* note 5, at pp. 409-418.

§ 274. — — The Voting Clause

In § 148 we discussed the federal power to prevent fraud, illegalities, theft, and other injurious practices which prevented honest elections involving federal offices. Of course a direct and immediate interest in this federal power, of peculiar concern to the integrity and continuance of our form of government, requires these federal actions, but the particular point here made is that through this clause and power the federal government is also exercising and effectuating what ordinarily is called a police power. In 1884 the Supreme Court, in such a voting case, rhetorically queried whether, because there was no "express authority to pass laws to punish theft or burglary of the Treasury," was there nevertheless no such power in Congress? By analogous reasoning the Court upheld the federal power to protect the right of a Negro to vote for federal officials by upholding the convictions of eight persons who conspired to prevent him from so doing, and who beat him up.¹⁸

§ 275. — — The War Powers

War-time prohibition, suspension of brothels near military camps, roundup, curfew, and relocation of dangerous persons, e. g., Japanese or even citizens of Japanese ancestry, confiscation of enemy property, and similar exercises of the war powers for these purposes, illustrate how the federal government may exercise police powers indirectly.¹⁹ Even assuming no police power to be available to the federal government during times of peace, still, in war, many things are prevented "so long as men fight, and . . . no court could regard them as protected by any constitutional rights."²⁰

§ 276. Limitations Upon the Federal Police Power—In General

The federal police power is, as has been pointed out, an offshoot of other powers, so that whatever limitations apply to these individual powers likewise apply to this. But there are separate limitations which can also be considered, e. g., the federal Bill of Rights, the effect of general limitations such as the Due Process Clause,²¹ and the effect of particular limitations

18. *Ex parte Yarbrough* (1884) 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274.

19. *Suppert, Inc. v. Caffey* (1920) 251 U.S. 264, 40 S.Ct. 141, 64 L.Ed. 260, *Kentucky Distilleries case*, *supra* note 4; *McKinely v. United States* (1919) 249 U.S. 397, 39 S.Ct. 324, 63 L.Ed. 668; *Hirabayashi v. United States* (1943) 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774, *Korematsu*

su v. United States (1944) 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194; *Cummings v. Deutsche Bank and Disconto-Gesellschaft* (1937) 300 U.S. 115, 57 S.Ct. 359, 81 L.Ed. 545.

20. *Holmes*, in *Schenck v. United States* (1919) 249 U.S. 47, 52, 39 S.Ct. 247, 63 L.Ed. 470.

21. See, e. g., *Carolene Products Co. v. United States* (1944) 323 U.S. 18,

such as the Eminent Domain Clause. Since the national police power is a twin one, i. e., over the District of Columbia and territories and possessions, on the one hand, and over the states or nation, on the other, limitations upon the federal government which may apply in the latter case need not necessarily apply in the former. We may, however, say that the limitations upon the national police power may be analogized to the state police power, so that if the 14th Due Process Clause, for example, does not prevent the state's exercise of that power, neither will the 5th Due Process Clause limit the national government's like exercise.²²

§ 277. — Illustrations

The requirement that the federal police power be an offshoot of another power is illustrated by the invalidation of an 1867 effort by Congress to forbid the sale of illuminating oils below a certain fire test; the Supreme Court felt that neither the commerce nor the tax powers of the Congress were involved. The same judicial denunciation occurred of an 1876 statute punishing the counterfeiting of trademarks and the sale of counterfeit trademark goods.²³ An illustration concerning specific limitations is found in the enactment of emergency rent laws for the national capital; Congress included various procedures, one securing a reasonable rent to the landlord. The dissenting four Justices felt that "the explicit provisions of the Constitution" should denounce these laws, and pointed to the 5th and 14th Amendments' Due Process Clauses, the Eminent Domain Clause of the 5th Amendment, and the Contract Clause in Art. I, § 10. They said that "These provisions are limitations upon the national legislation," and that "the line that separates [the police power's] legal from its illegal operation . . . must be drawn." The majority, led by Holmes, upheld the statute and felt that "A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change," and that "The only matter that seems to us open to debate is whether the statute goes too far. For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort, pressed to a certain height, might amount to a taking without due process of law."²⁴

65 S.Ct. 1, 89 L.Ed. 15, where this attack was rejected.

Mark Cases (1879) 100 U.S. 82, 25 L.Ed. 550.

22. The Kentucky Distilleries case, supra note 4, at pp. 156-157.

24. Block v. Hirsh, supra note 8, at pp. 159, 167, 157, 156, respectively.

23. United States v. De Witt (1870) 9 Wall. 41, 19 L.Ed. 593, Trade-

§ 278. Federal Effectuation of State Police Powers—In General

The federal government, through its various powers, may aid the states in effectuating their own police powers, e. g., "Congress," said the Supreme Court in 1919, "may exercise this [commerce] authority in aid of the policy of the State, if it sees fit to do so."²⁵ Or, in a later case, it specifically recognized that "The primary purpose of the [Fair Labor Standards] act is not so much to regulate interstate commerce as such, as it is, through the exercise of legislative power, to prohibit the shipment of goods in interstate commerce if they are produced under substandard labor conditions."²⁶ Sometimes, of course, the converse of this overall approach may be seen, as where a valid federal license is held to supersede and void any state license or monopoly grant, or where an (invalid) federal license to sell liquor is held not to negative a state conviction for a violation of a state law forbidding it.²⁷

§ 279. — Illustrations

Congress thus has forbidden the importation of convict-made goods into a state which makes their receipt, possession or sale illegal,²⁸ and likewise has supported the states in repressing the interstate traffic of liquor and kidnapping, lottery tickets, stolen automobiles, forged bills of lading, property, females, game taken in violation of state laws, etc.²⁹ The federal quarantine regulations of 1884 forbade interstate shipment of livestock having any infectious disease, and thereafter various acts forbade such transportation or mailing of insects, etc. injurious to plant crops, trees, etc.³⁰ Since the ratification of the 21st Amendment, which repealed the 18th Amendment and in effect permitted each state to decide and make its own prohibition laws, the Supreme Court has upheld state laws which forbid traffic in such merchandise unless licensed by it; but the reason-

25. *United States v. Hill* (1919) 248 U.S. 420, 425, 39 S.Ct. 143, 63 L. Ed. 337.

26. *Roland Co. v. Walling* (1946) 326 U.S. 657, 669, 66 S.Ct. 413, 90 L.Ed. 383.

27. *Gibbons v. Ogden* (1824) 9 Wheat. 1, 6 L.Ed. 23; *License Tax Cases* (1867) 5 Wall. 462, 18 L.Ed. 497, and see also *United States v. Constantine* (1935) 296 U.S. 287, 56 S.Ct. 223, 80 L.Ed. 233.

28. *Kentucky Whip Collar Co. v. Illinois Central R. R. Co.* (1937) 299 U.S. 334, 57 S.Ct. 277, 81 L.Ed. 270.

29. See Corwin, ed., *The Constitution of the United States of America* (1953) pp. 918-919, and 1169-1170.

30. See, e. g., 23 Stat. 31 (1884) 33 id. 1269 (1905) 37 id. 315 (1912) 44 id. 250 (1926), in effect overruling *Oregon-Washington R. & Nav. Co. v. Washington* (1926) 270 U.S. 87, 46 S.Ct. 279, 70 L.Ed. 482. On the use of the federal postal powers to effectuate state laws, see § 253 *supra*, and *Cushman, Postal, supra* note 5, esp. at pp. 432-434.

ing of several such opinions ignore the Amendment and place the state's control upon its police powers.³¹

31. See, e. g., *Ziffrin, Inc. v. Reeves* (1939) 308 U.S. 132, 138, 60 S.Ct. 163, 84 L.Ed. 128, and *Duckworth v. Arkansas* (1941) 314 U.S. 390, 62 S.Ct. 311, 86 L.Ed. 294, *Carter v.*

Virginia (1944) 321 U.S. 131, 64 S.Ct. 464, 88 L.Ed. 605; see however, *Collins v. Yosemite Park* (1938) 304 U.S. 518, 537-538, 58 S.Ct. 1009, 82 L.Ed. 1502.

Chapter XIII

THE STATE POLICE AND OTHER POWERS

§ 285. Introduction—The Powers of a State—In General

In 1842 Marshall spoke of the "immense mass" of legislative powers which a state possessed, and which could be used for the protection of the state, its citizens, and the promotion of local interests. Of what did this immense mass consist? Obviously a state power to tax must be had, and we have already seen that powers are also had over commerce, property, marital relations, education, voting, business and industry, a state militia, and the enumeration could go on indefinitely. This indefinable mass is the subject of the declaratory 10th Amendment, which merely states that "The powers not delegated to the United States . . . nor prohibited . . . to the States, are reserved to the States respectively, or to the people."¹ This huge reservoir of state power cannot, of course, be here examined, and it is only the state's police powers with which we are concerned. The approach may, in general, follow that expressed in 1959 by Justice Frankfurter, that we are not "to reduce the Constitution to a rigid, detailed and niggardly code. In adjusting the validity of a statute effecting a new form of relationship between States, the search is not for a specific constitutional authorization for it. Rather, according the statute the full benefit of the presumption of constitutional adjudication, we must find clear incompatibility with the United States Constitution. The range of state power is not defined and delimited by an enumeration of legislative subject-matter."²

§ 286. — — The Police Power

In the 1824 opinion just mentioned Marshall also spoke of a state's "own purely internal affairs, whether of trading or police,"³ and three years later he plucked out of such amorphous reservoir the state's "power to direct the removal of gunpowder"

1. The 10th Amendment "added nothing to the instrument as originally ratified and has no limited or special operation" *United States v. Sprague* (1931) 282 U.S. 716, 733, 51 S.Ct. 220, 75 L.Ed. 640. It merely "states but a truism that all is retained which has not been surrendered." *United States v. F. W. Darby Lumber Co.* (1941) 312 U.S. 100, 124, 61 S.Ct. 451, 85 L.Ed. 614.

2. The quotation is taken from *New York v. O'Neill* (1959) 359 U.S. 1, 6, 79 S.Ct. 564, 3 L.Ed.2d 585, and although having to do with the Rendition Clause (§ 75), and thus with the relationships between states, not the federal-state relationship, is apropos.

3. *Gibbons v. Ogden* (1824) 9 Wheat. 1, 209-210, 6 L.Ed. 23.

as the one which he termed "a branch of the police power," and which "unquestionably remains, and ought to remain, with the states. . . . The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a state."⁴ Ten years later the court, just taken over by Taney, upheld the power of New York to compel shipmasters to supply it with passenger lists; the majority opinion overruled the contention that the regulation infringed the federal exclusive commerce power because "the act is not a regulation of commerce, but of police; . . . a power which rightfully belonged to the States." Throughout the opinion the phrase is repeated in several places, and in two instances the court states that "all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained;" that these include "inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, etc. . . . [T]he removal of gunpowder, as a branch of the police power"⁵ In other words, the early concepts of a state's overall and internal powers, as differentiated from those which, external to it, were exercised by the federal government, included many elements. One of these was analogized to a city's police (noun) who sought to prevent crime, and this element of power was used to police (verb) dangerous aspects of trade and commerce, but only internally,

4. *Brown v. Maryland* (1827) 12 Wheat. 419, 443-444, 6 L.Ed. 678. Although foreign, and theoretically interstate, commerce was there involved, the Chief Justice pointed to a state's inspection powers (Art. I, § 10, and also § 232) as a possible basis for upholding the tax on the imported article; however, even though not there permitted, the police power was also invoked. See also *Coates v. City of New York* (1827) 7 Cow. 585 for a contemporary use of the term.

The term "internal police" may have been taken from the Galloway Plan of Union proposed to the First Continental Congress on September 28, 1774, the first paragraph of which suggested a combined British and American legislature to rule in the colonies, with each colony to "retain its present constitution and powers of regulating and governing its own internal police in all cases whatsoever."

5. *The Mayor, etc. of the City of New York v. Miln* (1837) 11 Pet. 102, 132, 139, 141-142, 9 L.Ed. 648, overruled in *Henderson v. New York* (1876) 92 U.S. 259, 23 L.Ed. 54, the court saying: "Very many statutes when the authority on which their enactments rest is examined, may be referred to different sources of power, and supported equally well under any of them. A statute may at the same time be an exercise of the taxing power and of the power of eminent domain. A statute punishing counterfeiting may be for the protection of the private citizen against fraud, and a measure for the protection of the currency and for the safety of the government which issues it. It must occur very often that the shading which marks the line between one class of legislation and another is very nice, and not easily distinguishable."

i. e., the internal police, as the external police may have been assumed to belong to the federal government under its external commerce powers.

§ 287. — — — Definition—Early Development

The police power of early concept and use is not the expanded term which is today defined so as to include more than yesterday. One of the earliest attempts to define a state's police powers occurred in 1847 when Taney said they "are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions."⁶ By 1885 this inherent power was particularized as the power "to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity."⁷ And in 1904 a text writer defined it as "the power of promoting the public welfare by restraining and regulating the use of liberty and property."⁸ In other words, it appears that at the outset the "police power" was a term of limited meaning, embracing the safety, morals and health of a community; but this required that a state's other "mass" of reserved powers be definitely categorized when the conflict with the federal exercise of its own powers erupted; that it proved much easier to dignify this undefined mass with that term, and whenever needed add to it; thus "education," "good order," "increase the industries," "development of resources," and "add to its wealth and prosperity" were tagged on to the original concept; and, finally, the entirety of the "public welfare" is brought within its ken, substantively, and the procedure whereby this public welfare was to be promoted was by "restraining and regulating the use of liberty and property."⁹

§ 288. — — — — Modern Approach

The ultra-modern approach to the police power is to ignore it, that is, to say that it is an aberration which should now be removed from the law. In its place we should recognize that the

6. *License Cases* (1847) 5 How. 504, 582, 12 L.Ed. 256.

7. *Barbier v. Connolly* (1885) 113 U. S. 27, 31, 5 S.Ct. 357, 28 L.Ed. 923.

8. Freund, *Police Power* (1904) p. 23.

9. See, e. g., *Bacon v. Walker* (1907) 204 U.S. 311, 27 S.Ct. 289, 51 L.Ed. 499, saying the police power "extends to so dealing with the conditions which exist in the state as to bring out of them the greatest

welfare of the people." And also, on esthetic considerations, *Welch v. Swasey* (1908) 214 U.S. 91, 29 S.Ct. 567, 53 L.Ed. 923; *Nectow v. Cambridge* (1928) 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842, and *General Outdoor Advertising Co. v. Department of Public Works* (1935) 289 Mass. 148, 193 N.E. 799, app. diss. (1936) 297 U.S. 725, 56 S.Ct. 495, 80 L.Ed. 1008.

state has power to act on behalf of the public welfare, limited only by the Constitution and the Supreme Court. In effect this is what Holmes and Brandeis were saying, as the former's language in § 266 discloses.¹⁰ But this goes too far, and shocks the average person's feeling that when he is prevented from enjoying his property to the fullest extent then some "one" should recompense him. The present concept of a state's police powers adapts slightly the definition given by Freund in 1904, namely, that it is the state's power to promote the public welfare by restraining and regulating the use of liberty and property limited only by constitutional and reasonable judicial requirements. The public welfare is the end to be furthered; the means are complete restraints or partial regulation, all without recompense; the objects so restrained or regulated are a person's liberty and property; and the limitations are constitutional (including the supremacy of federal powers and statutes) and judicial, i. e., the concept of reasonableness. Each of these aspects is examined below: the end is, of course, indefinable, although § 291 relates these to the means; some of the means and objects are disclosed in §§ 292-296; the limitations are found in §§ 297-299. Besides these few sections on the police power, Chapters XVIII to XX develop other aspects, for when the police power steps ever so slightly beyond the wavering line of reasonableness, then confiscation, eminent domain, or due process may be involved.¹¹

§ 289. — — — Inability of a State to Contract Away

The state may not "devest itself of the power to enact laws for the preservation of health and repression of crime."¹² and "No Legislature can bargain away the public health or the public morals. The People cannot do it, much less their servants."¹³

10. See also Justice Harlan's language in *Lake Shore & M. S. Ry. Co. v. Ohio ex rel. Lawrence* (1899) 173 U.S. 285, 298, 19 S.Ct. 465, 43 L.Ed. 702.

11. E. g., in *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322, Holmes denounced a statute which forbade the mining of anthracite coal in such a way as to cause the subsidence of any home, saying: "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

12. *Butchers' Union Slaughter-House etc. Co. v. Crescent City Live-Stock Laundry, etc. Co.* (1884)

111 U.S. 746, 751, 4 S.Ct. 652, 28 L.Ed. 585.

13. *Stone v. Mississippi* (1880) 101 U.S. 814, 819, 25 L.Ed. 1079, upholding a constitutional amendment forbidding lotteries even though a year or so earlier the legislature had chartered a corporation for 25 years to conduct a lottery. See also *Boston Beer Co. v. Massachusetts* (1877) 97 U.S. 25, 32, 33, 24 L.Ed. 989, *Rast v. Van Deman & Lewis Co.* (1916) 240 U.S. 342, 363, 36 S.Ct. 370, 60 L.Ed. 679, *St. Louis Poster Advertising Co. v. St. Louis* (1919) 249 U.S. 269, 274, 39 S.Ct. 274, 63 L.Ed. 599. In *Corporation of Brick Church v. Mayor, et al.* (1826) 5 Cow. 538, 540, a suit was dismissed as against the

Neither may the federal government be bound by its gold payment agreements where conditions require otherwise.¹⁴ Early in the last century Taney rejected a construction of a state charter which, in effect, would have granted a monopoly to the owners of a bridge over the Charles River and, by parity of reasoning, have shaken the foundations of the new economic freedom then emerging; he refused to "deal thus with the rights reserved to the States; and by legal intendments and mere technical reasoning take away from them any portion of that power over their own internal police and improvement, which is so necessary to their well being and prosperity."¹⁵

§ 290. — — — Inability of Private Contracts to Prevent Its Exercise

If a state itself, as a party to an agreement, cannot contract away its police powers, then still less can private persons so contract between themselves as to reduce or render it impotent; and this regardless of any claimed right under the prohibitions upon a state imposed by the Contract Clause in Art. I, § 10. So, too, a private agreement requiring payment in gold must give way to the superior federal power and control over its coinage and money.¹⁶ "The States retain adequate power to protect the public health against the maintenance of nuisances despite insistence upon existing contracts. Legislation to protect the public safety comes within the same category of reserved powers. . . . The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts."¹⁷ In other words, this power of a state, "which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government

city for breach of covenant in passing a by-law forbidding the use of lands as a cemetery, although previously the city had sold the lands for these express purposes, the court saying the defendant-officials "had no power as a party [to the covenant] to make a contract which should control or embarrass their legislative powers and duties."

14. *Perry v. United States* (1935) 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912, *Nortz v. United States* (1935) 294 U.S. 317, 55 S.Ct. 428, 79 L.Ed. 907, *Smyth v. United States* (1937) 302 U.S. 329, 58 S.Ct. 248, 82 L.Ed. 294, and discussion in § 252.

15. *Charles River Bridge v. Warren Bridge* (1837) 11 Pet. 420, 552, 9 L. Ed. 773. Of course if a definite,

unambiguous, exclusive franchise is granted, with a positive provision that no other bridge is to be built, a different result is reached, e. g., *The Binghamton Bridge* (1866) 3 Wall. 51, 18 L.Ed. 137. If the state then desires to do anything, eminent domain must be used. *Long Island Water Supply Co. v. Brooklyn* (1897) 166 U.S. 685, 17 S.Ct. 718, 41 L.Ed. 1165.

16. *Norman v. Baltimore & Ohio R. Co.* (1935) 294 U.S. 240, 55 S.Ct. 407, 79 L.Ed. 885, and see discussion in § 252.

17. *Home Bldg. & Loan Ass'n v. Blaisdell* (1934) 290 U.S. 398, 436-437, 54 S.Ct. 231, 78 L.Ed. 413, citations omitted.

to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals.”¹⁸

§ 291. Police Powers in Use—In General

The analysis of a state's police powers involves two questions; first, whether the power does exist in the particular case and can be there exercised; and, second, assuming its existence, whether it is being used properly. The difficulty with this dichotomy is that neither question is ever considered separate from the other; thus a judicial holding combines both aspects into one determination, and this includes also the (third) question whether any limitation upon the police power is applicable. When these questions of power, use, and limitation are brought up for a judicial answer, the end of the legislation or activity necessarily is considered. For a reasonable relation between the end and the method must exist, otherwise the police power is not justifiably utilized.¹⁹ In the sections which follow we limit the use of the police power to civil matters and proceedings, and through the illustrations given the preceding questions are somewhat answered. We utilize some of the ends in the definitions previously given for the purpose of enumerating the aspects of the police power to be considered, namely, morals and health, safety, fraud, business, etc.; to these we add jurisdiction. A *caveat* should be set forth, that only a suggestive and preliminary exploration of these ends is attempted.

18. *Manigault v. Springs* (1905) 199 U.S. 473, 480, 26 S.Ct. 127, 50 L.Ed. 274; see also *Hudson County Water Co. v. McCarter* (1908) 209 U.S. 349, 357, 28 S.Ct. 529, 52 L.Ed. 828, and *Pennsylvania Coal Co. v. Mahon*, supra note 11, at pp. 420-421, where Brandeis dissented and wrote (citations omitted): "If the public safety is imperiled, surely neither grant nor contract can prevail against the exercise of the police power. The rule that the state's power to take appropriate measures to guard the safety of all who may be within its jurisdiction may not be bargained away was applied to compel carriers to establish grade crossings at their own expense, despite contracts to the contrary; and, likewise, to supersede, by an employers' liability act, the provision of a charter ex-

empting a railroad from liability for death of employes, since the civil liability was deemed a matter of public concern, and not a mere private right. Nor can existing contracts between private individuals preclude exercise of the police power."

19. "It may be said in a general way that the police power extends to all the great public needs," *Noble State Bank v. Haskell* (1911) 219 U.S. 104, 111, 31 S.Ct. 186, 55 L. Ed. 112, and "the determination we are called upon to make is whether the act has a real and substantial relation to that end or is a clear and arbitrary invasion of appellant's property rights" *Louis K. Liggett Co. v. Baldridge* (1928) 278 U.S. 105, 111, 49 S.Ct. 57, 73 L.Ed. 204.

§ 292. — In Particular—Morals and Health

The protection of the morals of a state's people is a sufficient reason to permit the police power to forbid, control or regulate liquor, motion pictures, gambling, lotteries, pool rooms, dance halls, prostitution, hotels, and like matters. The states may regulate all phases of the several professions connected with health, e. g., medical, pharmaceutical, and may do whatever else has a direct and reasonable relation to the protection of the health of the people, e. g., control burials, compel vaccinations, limit the smoke nuisance, protect the supply of milk and food, denounce the employment of children, regulate hours of labor, pass quarantine and inspection laws, prohibit the sale of oleo-margarine, regulate the sale of habit-forming drugs, garbage disposal, etc.²⁰ The Supreme Court has denounced a statute which authorized the sterilization of an "habitual criminal," but has upheld the commitment of individuals with a "psychopathic personality" and has even gone so far as to permit the sterilization of institutionalized mental defectives with a background of such hereditary feeble-mindedness, because "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. Three generations of imbeciles are enough."²¹ Zoning and like requirements, building set-backs, regulation of outdoor advertising, and laws of analogous nature, are upheld for health and aesthetic reasons.²²

§ 293. — — Safety

The police powers of a state uphold numerous types of regulations and requirements imposed upon business in general and upon railroads, for example, in particular. Thus a state may require the storage of gasoline away from dwellings, prohibit washing and ironing in public laundries and wash houses except within prescribed territorial and time limits, demolish and remove wooden buildings erected within defined city fire limits contrary to regulations then in force, require safe pillars in coal mines, and that watersheds in the country be kept clear.²³ And

20. See, e. g., Corwin, ed., *The Constitution of the United States* (1953) pp. 1031-1032 on morals, pp. 248-250 for legislation and cases concerning humans, cattle, plants, etc., pp. 1023-1024 for professions, and pp. 1030-1031 for health items.

21. Respectively, *Skinner v. Oklahoma* (1942) 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655, on the ground of vagueness and uncertainty;

Minnesota ex rel. Pearson v. Probate Court (1940) 309 U.S. 270, 60 S.Ct. 523, 84 L.Ed. 744, and *Buck v. Bell* (1927) 274 U.S. 200, 207, 47 S.Ct. 584, 71 L.Ed. 1000.

22. *Gorieb v. Fox* (1927) 274 U.S. 603, 47 S.Ct. 675, 71 L.Ed. 1228, Corwin, *supra* note 20, pp. 1027-1028.

23. *Block v. Hirsh* (1921) 256 U.S. 135, 155-156, 41 S.Ct. 458, 65 L.Ed.

a railroad may be required to: check the speed of interstate trains at highway crossings where no unreasonable restraint upon interstate commerce results; at its own expense and regardless of the lack of any benefit to itself, eliminate grade crossings; make highway crossings reasonably safe and convenient for public use; repair viaducts; fence its right of way; lay tracks to conform to the established grade; fill in tracks at street intersections; remove tracks at busy street intersections; reestablish an abandoned station; and impose liability for fire communicated by its locomotives.²⁴

§ 294. — — Fraud

Limitations upon retailers selling their entire stock at a single transaction, i. e., bulk sales, and also blue-sky laws, were upheld early in the century because they prevented fraud and eliminated the marketing and sale of worthless stocks, thereby safeguarding a gullible public.²⁵ So, too, are laws upheld requiring honest weights and measures, standard containers, that the nature of the product be set forth to be seen, fixing the size of bread loaves, placing a prohibitive license fee upon the use of trading stamps, regulating maximum interest rates, and licensing insurance agents, ticket brokers, employment agencies, and others.²⁶ And a law was also upheld which gave a using purchaser of a farm machine a reasonable opportunity to determine if it was reasonably fit for its purpose, and if not then he could rescind, for "The object sought to be attained . . . is to protect farmers . . . against losses from investments in important machines that are not fit for the purposes for which they are purchased and to guard against crop losses likely to result from reliance upon such machines."²⁷

§ 295. — — Business, Labor, Public Convenience

The method of paying wages, form and time of these payments, and various requirements seeking to protect the wage-earner have been upheld as valid exercises of the police power, as has the power to fix minimum wages.²⁸ Thus in the Parrish

865; Corwin, *supra* note 20, p. 1029.

24. *Southern Railway Co. v. King* (1910) 217 U.S. 524, 30 S.Ct. 594, 54 L.Ed. 868; if unduly restrictive of interstate commerce, the speed statute is invalid, *Seaboard Air Line Ry. Co. v. Blackwell* (1917) 244 U.S. 310, 37 S.Ct. 640, 61 L.Ed. 1160; and see Corwin, *supra* note 20, p. 345.

25. *Lemieux v. Young* (1908) 211 U.S. 489, 29 S.Ct. 174, 53 L.Ed. 295; *Hall v. Geiger-Jones Co.* (1917) 242 U.S. 539, 37 S.Ct. 217, 61 L.Ed. 480.

26. Corwin, *supra* note 20, at pp. 1018-1022.

27. *Advance-Rumely Thresher Co. v. Jackson* (1932) 287 U.S. 283, 289, 53 S.Ct. 133, 77 L.Ed. 306.

28. See cases and discussions in *West Coast Hotel Co. v. Parrish*

case, the court upheld the police power of a state to restrict freedom of acts between employer and employee by sustaining statutes

“limiting employment in underground mines and smelters to eight hours a day; in requiring redemption in cash of store orders or other evidences of indebtedness issued in the payment of wages; in forbidding the payment of seamen’s wages in advance; in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine; in prohibiting contracts limiting liability for injuries to employees; in limiting hours of work of employees in manufacturing establishments; and in maintaining workmen’s compensation laws.”

A law assessing each state bank for the creation of a depositor’s guaranty fund, and one compelling automobile insurance companies to enter an assigned risk plan for drivers, were upheld because of the “special relation” these businesses had to the government.²⁹ The public convenience upheld a statute requiring railways to stop certain trains at places of 3,000 inhabitants; so too with respect to upholding a state conservation law forbidding any person in control of oil or gas wells to permit these to escape into the open air without being piped or contained.³⁰ As between the ornamental value of diseased red cedar trees, which infected with cedar rust nearby apple orchards, and these latter, a statute was upheld which permitted the cedar trees to be cut down.³¹

In 1877 the Supreme Court upheld the ability of a state to regulate a business affected with a public interest,³² but subsequent cases limited this to public utilities. In 1934 the Supreme Court called a halt, later reversed the previous limiting cases, and today permits all private businesses falling within such “affected” concept to be controlled and even price-regulated by the states.³³ Emergency rent laws are upheld, as are state laws pre-

(1937) 300 U.S. 379 (quotation at p. 393), 57 S.Ct. 578, 81 L.Ed. 703, and *United States v. F. W. Darby Lumber Co.* (1941) 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609; see also Corwin, *supra* note 20, at pp. 976-980.

29. *California State Auto. Ass’n etc. v. Maloney* (1951) 341 U.S. 105, 71 S.Ct. 601, 95 L.Ed. 788, *Noble State Bank v. Haskell*, *supra* note 19.

30. *Lake Shore, etc. v. Ohio*, *supra* note 10; *Ohio Oil Co. v. Indiana* (1900) 177 U.S. 190, 207-211, 20 S.Ct. 576, 44 L.Ed. 729; Corwin, *supra* note 20, pp. 1025-1027.

31. *Miller v. Schoene* (1928) 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568.

32. See, e. g., *Munn v. Illinois* (1877) 94 U.S. 113, 24 L.Ed. 77, the first of the series of “Granger Cases.” On this analysis see Forkosch, *Labor and Price Control*, 2 *Lab.L.Jl.* 567 (1951) giving citations and cases.

33. See *Olsen v. Nebraska* (1941) 313 U.S. 236, 61 S.Ct. 862, 85 L.Ed. 1305, giving cases and development.

venting mortgage foreclosures under certain conditions, and providing for a moratorium thereon.³⁴

§ 296. — — Jurisdiction

A state cannot assert jurisdiction over a person domiciled elsewhere, so that without some reasonable connection to such nondomiciliary no judgment *in personam* is ordinarily possible. However, acting under its police powers, a "state may declare that the [automobile] use of the highway by the nonresident is the equivalent of the appointment of the [state] registrar as agent on whom process may be served."³⁵ Thus in one state, for example, there are provisions which, within limits, permit service, resulting in a *personam* jurisdiction, upon nonresident aircraft or watercraft operators or owners, and upon nonresident natural owners doing business in the state, as well as upon nonresident motorists.³⁶

§ 297. Limitations Upon the Police Power—In General

We have said that the police power may be identified with the "general mass" of a state's reservoir of powers, but this is not strictly correct. For our examination of the tax and commerce powers of a state disclosed how powerful these were. The police power is thus a separate power, and in effect becomes the base upon which state action is predicated if any or all other powers are insufficient. It is thus the least definable and the least limitable, and yet the most judicially cognizable of all of a state's powers. So long as there is a real and substantial relation to a public end, e. g., the public health, safety, morals, general welfare, and so long as the means employed are neither arbitrary nor oppressive, the judiciary will generally uphold the state law or action. Of course where there is a constitutional prohibition, or an outright conflict with the federal powers, or the state unduly burdens (say) interstate commerce or unduly impairs a federal power, then regardless of the aforesaid reasonable relation and means, the state's legislation will be denounced.

§ 298. — Constitutional Prohibitions

A unanimous Court felt that "it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety,

34. See Corwin, *supra* note 20, at pp. 358-360.

35. *Hess v. Pawloski* (1927) 274 U.S. 352, 356-357, 47 S.Ct. 632, 71 L.Ed. 1091.

36. See Forkosch, ed., *Carmody's New York Practice* (7th ed. 1956) pp. 117-121, and see also § 412.

good order, comfort, or general welfare of the community”³⁷ This statement is not to be taken literally, for while “It is elementary that enforcement of uncompensated obedience to a regulation passed in the legitimate exertion of the police power is not a taking of property without due process of law,”³⁸ still when the regulation goes too far a taking does occur and compensation must be paid. “The only matter that seems to us open to debate is whether the statute goes too far. For . . . there comes a point at which the police power ceases and leaves only that of eminent domain”³⁹ In other words, the judiciary must examine each set of facts to determine reasonableness or unreasonableness of ends, legitimacy or illegitimacy of method, and even then reasonable men will differ, e. g., Holmes’ feeling that “To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it,” and Brandeis’ feeling that “Restriction upon use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put.”⁴⁰ When the police power oversteps its legitimate bounds then the Eminent Domain Clause, through the 14th Amendment’s provisions, requires payment for the taking of the property.⁴¹ Since the Supreme Court has outlawed segregation in schools, numerous lower decisions have held that municipal or state segregated operation of public parks, playgrounds, tennis courts, swimming pools, zoos, golf courses, ball parks, museums, and auditoriums “may not be justified as a means to preserve public peace, and is not a proper exercise of police power.”⁴²

§ 299. — Conflicts With Federal Powers

We have already seen that the police power is unavailing when its exercise unduly burdens or affects the federal commerce powers,⁴³ or when there is a conflict with the exercise of a fed-

37. *Atlantic Coast Line R. R. Co. v. Goldsboro* (1914) 232 U.S. 548, 558, 34 S.Ct. 364, 58 L.Ed. 721.

38. *New Orleans Public Service, Inc. v. New Orleans* (1930) 281 U.S. 682, 687, 50 S.Ct. 449, 74 L.Ed. 1115. The burden is upon the objectant to show the actions of the state “are so clearly unreasonable and arbitrary as to amount to a “due process violation.” At p. 686.

39. *Block v. Hirsh* (1921) 256 U.S. 135, 156, 41 S.Ct. 458, 65 L.Ed. 865.

40. *Pennsylvania Coal Co. v. Mahon*, supra note 11 at pp. 414, 418, Brandeis being the lone dissenter.

41. See, e. g., *Sweet v. Richel* (1895) 159 U.S. 380, 16 S.Ct. 43, 40 L.Ed. 188.

42. *Shuttlesworth v. Gaylord* (N.D. Ala.1961) 202 F.Supp. 59, 63 with fn. 2 at p. 62 giving numerous citations. See also §§ 460–461, *infra*.

43. See, e. g., the discussion and analysis in *Southern Pacific Co. v. Arizona* (1945) 325 U.S. 761, 766–770, 65 S.Ct. 1515, 89 L.Ed. 1915, rejecting the “convenient apologetics of the police power” in that case.

eral power,⁴⁴ or where the state attempts to regulate while the federal power controls or otherwise requires, e. g., under the postal power, denouncing a state act,⁴⁵ or where the federal functions are impaired.⁴⁶ As Holmes wrote, "This is not a controversy between equals. The United States is asserting its sovereign power to regulate commerce There is no question that this power is superior to that of the states to provide for the welfare or necessities of their inhabitants."⁴⁷ In other words, the state's police powers are unavailing to hinder the full accomplishment and execution of the Congressional desires and purposes when these are judicially ascertained.⁴⁸

44. See, e. g., *Gibbons v. Ogden* (1824) 9 Wheat. 1, 6 L.Ed. 23.

45. *Essex v. New England Telegraph Co.* (1915) 239 U.S. 313, 36 S.Ct. 102, 60 L.Ed. 301, *Pensacola Telegraph Co. v. Western Union Telegraph Co.* (1878) 96 U.S. 1, 24 L.Ed. 708.

46. *Johnson v. Maryland* (1920) 254 U.S. 51, 41 S.Ct. 16, 65 L.Ed. 126.

47. *Sanitary District of Chicago v. United States* (1925) 266 U.S. 405, 425-426, 45 S.Ct. 176, 69 L.Ed. 352.

48. See, e. g., discussion and variation in *San Diego Building Trades Council, etc. v. Garmon* (1959) 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775.

Chapter XIV

LIMITATIONS AND THE FEDERAL-STATE CONFLICT

§ 305. Introduction

As we saw in § 36, the power—limitation relation stated that for every power there had to be a degree of a parallel limitation, which also means that both do not necessarily equalize each other. And even if this concept of political theory were not correct, still the Constitution's Supremacy Clause involves a built-in limitation upon the states, and also discloses a future conflict between the two sovereigns. What are the limitations upon the numerous federal and state powers already studied? In broad perspective, these limitations consist of: the doctrine of the separation of powers; the system of checks and balances; the limited grant of powers to the federal government; the reservoir of state (and police) powers; the conflict between these two overall powers which thereby serves as a brake; specific prohibitions upon federal and state governments found in the original Constitution; amendments which similarly prohibit; and rights of persons and citizens found in the Constitution and the amendments. Since most of these have been or will be discussed either specifically or in connection with other matters, we need here analyze only certain of the specific limitations, and recapitulate the federal-state conflict from constitutional and statutory points of view.

§ 306. Constitutional Limitations—Specific Federal Prohibitions—In General

There are, of course, numerous specific Constitutional prohibitions upon each of the three departments, but we limit ourselves to those found in Art. I, § 9. Some of these, however, are today inapplicable, e. g., cl. 1 which has a built-in time limitation, or have been somewhat modified by an amendment, e. g., cl. 4, modified by the 16th Amendment which now permits a direct income tax, or are self-evident, e. g., cl. 8, which forbids titles of nobility, etc., and do not require discussion, e. g., cl. 7, requiring appropriations before money can be drawn from the federal treasury; others have been covered in previous chapters sufficiently, and do not require additional discussion, e. g., cls. 5 and 6, covered in the discussion of commerce. We are therefore left with three Clauses, now to be considered.¹

1. See also §§ 15 and 164 for additional comments on the clauses not

here covered. Mention should also be made of "incorporated" limita-

§ 307. — — In Particular—The Habeas Corpus Clause

This second clause (see also § 164) is the only place in the Constitution where habeas corpus, i. e., the Great Writ, is mentioned. The first Judiciary Act of 1789 provided for its issuance according to "the usages and principles of law," but in 1948 a majority of the Supreme Court felt that the federal courts were not thereby "confined to the precise forms of that writ in vogue at the common law or in the English judicial system."² Although the common law made the writ available only if a lack of court jurisdiction was disclosed by the record, in 1867 Congress extended it to all those restrained of their liberty in violation of a right under the Constitution, a treaty, or a law, thus liberalizing the common law procedure.³ Any federal court, when Congressionally authorized, including the Supreme Court, may issue the Great Writ, and its suspension may apparently be authorized only by Congress.⁴

§ 308. — — — The Bill of Attainder Clause

This clause (see also § 164) applies not only to the legislative punishment, without a judicial trial, of an individual, but also to the milder pains and penalties which may be inflicted by statute. The prohibition applies to all "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial" ⁵ In 1867 the Supreme Court invalidated a provision of the Missouri Reconstruction Constitution which required an oath before a person could practice a profession, "both because it constituted a bill of attainder and because it had an ex post facto operation. On the same day . . . the Court . . . also held invalid on the same grounds an Act of Congress which required

- tions, e. g., the Contract Clause examined in § 311 has, in effect, been used by the Supreme Court through the 5th Due Process Clause, *Perry v. United States* (1935) 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912, *Louisville Joint Stock Bank v. Radford* (1935) 295 U.S. 555, 55 S.Ct. 854, 79 L.Ed. 1593, and the concepts of the Equal Protection Clause of the 14th Amendment are likewise used through the 5th, *Bolling v. Sharpe* (1954) 347 U.S. 497, 449-500, 74 S.Ct. 693, 98 L.Ed. 884.
2. *Price v. Johnston* (1948) 334 U.S. 266, 282, 68 S.Ct. 1049, 92 L.Ed. 1356.
3. *Frank v. Mangum* (1915) 237 U.S. 309, 331, 35 S.Ct. 582, 59 L.Ed. 969. It can thus be used in deportation matters. *Forkosch, Administrative Law* (1956) § 322.
4. See, e. g., discussions in *Ex parte Merryman* (C.C.D.Md.1861) 17 Fed. Cas. 144, No. 9,487; *Ex Parte Milligan* (1866) 4 Wall. 2, 18 L.Ed. 281, and *Duncan v. Kahanamoku* (1946) 327 U.S. 304, 66 S.Ct. 606, 90 L.Ed. 688.
5. *United States v. Lovett* (1946) 328 U.S. 303, 315, 66 S.Ct. 1073, 90 L.Ed. 1252.

attorneys practicing before this Court to take a similar oath.”⁶ And in 1946 a Congressional provision was held invalid as a bill of attainder which prohibited any part of an appropriation thereafter to be used “to pay any part of the salary, or other compensation for the personal services, of” three named individuals.⁷

§ 309. — — — The Ex Post Facto Clause

Shortly after the Constitution became effective the Supreme Court held that this clause (see also § 164) applied only to penal and criminal statutes within the federal jurisdiction, and is violated when a statute makes criminal an act otherwise innocent when committed, or inflicts a greater punishment than the law earlier provided.⁸ In the preceding section two 1867 opinions reject a state and a federal law on grounds there and here discussed; however, federal statutes were upheld even though one denied the right to vote to a polygamist who had not practiced it since the act was passed, another permitted the expulsion of an alien for crimes committed before the legislation, and a third permitted cancellation of a naturalization certificate for fraud although it was obtained before the statute was enacted.⁹

§ 310. — Specific State Prohibitions—In General

In Art. I, § 10 the specific prohibitions placed upon the states are found in three clauses. The first clause in effect negatives the state exercise of certain of the federal powers granted in § 8, for example, not to enter into any treaty, repeats certain of the federal limitations in § 9, including the two discussed in the preceding two sections, and then adds the contract prohibition (§ 311). The second clause involves commerce, and its prohibitions have already been discussed in Chapter X (see also § 77). The third clause in effect gives to the federal government

6. *Ibid.*, at p. 315, citing *Cummings v. Missouri* (1867) 4 Wall. 277, 18 L.Ed. 356, and *Ex parte Garland* (1867) 4 Wall. 333, 18 L.Ed. 366.

7. The *Lovett* case, *supra* note 5, at p. 305, fn. 1. For additional aspects of this clause, see § 417 where the § 10 limitation upon the states is discussed. See also Justice Black's separate opinion in *Joint Anti-Fascist Refugee Committee v. McGrath* (1951) 341 U.S. 123, 143-144, 71 S.Ct. 624, 95 L.Ed. 817, feeling the clause was there involved.

8. *Calder v. Bull* (1798) 3 Dall. 386, 392, 393, 1 L.Ed. 648, holding in-

valid a change in the rules of evidence permitting a conviction upon less or different evidence than required when the crime was committed; as for foreign laws, see *Neely v. Henkel* (1901) 180 U.S. 109, 123, 21 S.Ct. 302, 45 L.Ed. 448, and also *Lindsey v. Washington* (1937) 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182.

9. Respectively: *Murphy v. Ramsey* (1885) 114 U.S. 15, 5 S.Ct. 747, 29 L.Ed. 47; *Mahler v. Eby* (1924) 264 U.S. 32, 44 S.Ct. 283, 68 L.Ed. 549; *Johannessen v. United States* (1912) 225 U.S. 227, 32 S.Ct. 613, 56 L.Ed. 1066.

the exclusive power over war, by prohibiting the states from doing anything connected with or engaging in it, prevents the states from laying any duty of tonnage, and also contains the Compact Clause (§ 74). The greatest of all Constitutional limitations upon the states is, of course, the Due Process Clause of the 14th Amendment, but this is discussed in Part C.¹⁰

§ 311. — — In Particular—The Contract Clause

“No State shall . . . pass any . . . Law impairing the Obligation of Contracts,” reads this provision, and since only a legislature can “pass” any law, the prohibition does not ordinarily apply to judicial decisions.¹¹ By “obligation” is meant the legal rules in force when the contract is made and which enter into and comprise a part of the agreement.¹² By “Contracts” the Supreme Court early included public ones, i. e., those entered into by a state either as a sovereign or in its proprietary capacity, as well as private ones, i. e., those entered into between persons,¹³ and also included, for example, executed and executory agreements, deeds of realty, and private corporate charters when the power to alter is not reserved.¹⁴ The term “impair” has been defined as occurring when a law “renders them [the obligations] invalid, or releases or extinguishes them, and impairment, as above noted, has been predicated of laws which without destroying contracts derogate from substantial contractual rights.” Chief Justice Hughes then limited the application of the Contract Clause “by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital inter-

10. For additional discussions of the limitations upon the states, see §§ 16, 74-81. On the *ex post facto* clause, see § 416.

11. Although it did in *McCullough v. Virginia* (1898) 172 U.S. 102, 19 S.Ct. 134, 43 L.Ed. 382, and cases cited; see also *Tidal Oil Co. v. Flanagan* (1924) 263 U.S. 444, 450-452, 44 S.Ct. 197, 68 L.Ed. 382, rejecting Congressional authority so to act, and pointing to the court's diversity jurisdiction and power to determine applicable state law, although because of *Erie Railroad Co. v. Tompkins* (1938) 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, this reasoning no longer applies.

12. *Wood v. Lovett* (1941) 313 U.S. 362, 370, 61 S.Ct. 983, 85 L.Ed. 1404, quoting from the *Minnesota Mortgage Moratorium Case*, *Home Building & Loan Ass'n v. Blaisdell*

(1934) 290 U.S. 398, 429, 54 S.Ct. 231, 78 L.Ed. 413.

13. E. g., *Chisholm v. Georgia* (1793) 2 Dall. 419, 1 L.Ed. 440; although the jurisdiction of the court to entertain suits against a state was repealed by the 11th Amendment, this judicial construction given to the Contract Clause remains, e. g., *Fletcher v. Peck* (1810) 6 Cr. 87, 3 L.Ed. 162, the first case where a state law was so denounced, but applied to a legislative grant of property. Marriage results in a status, not a contract, relationship, so that a legislatively-granted divorce is not within the Contract Clause. *Maynard v. Hill* (1888) 125 U.S. 190, 8 S.Ct. 723, 31 L.Ed. 654.

14. In addition to previous cases, see also *Trustees of Dartmouth College v. Woodward* (1819) 4 Wheat. 518, 4 L.Ed. 629.

ests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order."¹⁵ The Contract Clause reached its constitutional apogee in importance between 1865 and 1888, and since then has shrunk in use save for the New Deal flurry during the 1930's; the reason probably is the wider scope available under the Due Process Clause.

§ 312. — — — The Treaty, Alliance, or Confederation Clause

The pre-Articles of Confederation alliances enabled the rebelling colonies later to enter into this Confederation. The Founding Fathers thus knew of alliances and confederations (to be distinguished from the federation which the Constitution created), and desired to prohibit any of the new federal constituents from having two allegiances. Under this clause, therefore, the Supreme Court was able to hold that the seceding states could not form a new confederation.¹⁶ Treaties, of course, had been entered into by the Congresses, Continental and Articles, so that the new federal government certainly would not share this power with the states; thus a state has no power to deliver up a fugitive from justice to a foreign nation.¹⁷ Whether a 1941 decision, upholding the ability of Florida to regulate the manner in which its state citizens may fish for sponges outside its territorial waters, is any indication that a state may now logically enter into any arrangement with, say, Mexico or Haiti concerning this,

15. The Minnesota Mortgage Moratorium Case, *supra* note 12, at pp. 431, 435, cases omitted, and also pp. 435-442 for numerous other decisions; see also Chaps. XII and XIII for additional discussions on the Contract Clause, and Corwin, ed., *The Constitution of the United States* (1953) pp. 329-362; *East New York Savings Bank v. Hahn* (1945) 326 U.S. 230, 66 S.Ct. 69, 90 L.Ed. 34.

The question of retroactivity is not further discussed, but reference to the following items, and citations therein, are helpful: Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 Calif.L.Rev. 216 (1960); the Minnesota Mortgage Moratorium Case, *supra* note 12; *Lynch v. United States* (1934) 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434; and *Addison v. Huron Stevedoring*

Corp. (2d Cir. 1953) 204 F.2d 88, cert. den. (1953) 346 U.S. 877, 74 S.Ct. 120, 98 L.Ed. 384. The cases disclose that the Due Process and other Clauses are also used in an effort to overcome or uphold retroactive legislation, e. g., *Binney v. Long* (1936) 299 U.S. 280, 57 S.Ct. 206, 81 L.Ed. 239, distinguished slightly in *Whitney v. State Tax Commission* (1940) 309 U.S. 530, 60 S.Ct. 635, 84 L.Ed. 909, and see also *Lynch case*, *supra*.

16. *Williams v. Bruffy* (1878) 96 U.S. 176, 183, 24 L.Ed. 716.

17. *Holmes v. Jennison* (1840) 14 Pet. 540, 10 L.Ed. 579; see the concept also used in *United States v. California* (1947) 332 U.S. 19, 67 S.Ct. 1658, 91 L.Ed. 1889, involving the right to oil under the ocean bed along the three-mile marginal coastline.

is problematical;¹⁸ politically and practically the answer should be no.

§ 313. The Federal-State Conflict—Constitutional

The federal Constitution endeavored not only to create a federal government, give it powers, and prohibit others from being exercised by it and by the states, but also to have the federal government subjected to limitations through the separation of powers and the system of checks and balances. This balancing concept is also found as between the federal and the state governments throughout the document. For example, the states are given power to hold and conduct elections, but when federal offices are involved then the federal government, through Congress, is given the power to "make or alter such" state regulations (§§ 148, 274); the commerce power is rendered unto both the federal and the state governments but, for example, under our commerce analysis there is hardly anything which the federal government cannot control if it so desires (§§ 221, 270); a state cannot live without the power to tax, and yet this power is subject to the superior federal plenary control of its granted powers (§§ 227, 252, 271); and under its war powers the federal government controls every recess of a state's jurisdiction (§§ 139, 256, 275). So, too, where any (portion) of the Bill of Rights is held to limit the states, as through the 14th Due Process Clause, then the federal interpretation accorded the Amendment when applied federally, also is applied locally.^{18a} The Supremacy Clause applies also to "the Laws of the United States which shall be made in Pursuance" of the Constitution, and it is the conflict between the federal power so exerted, and the states' powers and acts, which is the subject-matter of most of the current litigation.

§ 314. — Statutory

The most outstanding series of illustrations of the federal-state conflict in the statutory area has already been discussed in Chapter X, where the federal commerce power was analyzed. Both sovereigns are "granted" a power over commerce, the federal over inter, and the states over intra; they both therefore start from the same base; now both legislate. In §§ 226-232, but especially in § 228, the clash between the state's powers and

18. *Skiriotes v. Florida* (1941) 313 U. S. 69, 78-79, 61 S.Ct. 924, 85 L.Ed. 1193, where the unanimous court also referred to the absence of any conflicting federal legislation, and analogized to the federal control of federal citizens outside the territory of the United States.

18a. E. g., *Mapp v. Ohio* (1961) 367 U.S. 643, 81 S.Ct. 1648, 6 L.Ed.2d 1081, where the 4th Amendment's prohibitions against unreasonable searches and seizures was made applicable in its entire federal interpretation against the states. See § 337 on this.

the federal commerce power disclosed how impotent the former were against a determined latter, and the water-drop concept (§ 221) emasculated the state's powers over intrastate commerce; the preemption doctrine (§§ 236-241) nullifies state laws, regardless of their need or goodness; and even the police powers of a state are ineffective against a superior federal power (§§ 298-299). To illustrate this overall approach, the Supreme Court has denounced state sedition laws where the federal enactments preempted the field; it has immunized a broadcasting company from tort liability for alleged libelous statements because the intent of a Congressional statute was held so to require; it has refused to permit a state court to award damages for union conduct made an unfair labor practice by the state's laws, even though the federal Labor Board had no power to award such damages and therefore had not acted, for "since such activity is arguably within the compass of § 7 or § 8 of the [federal] Act, the State's jurisdiction is displaced;" it has invalidated a state quarantine against shipments of alfalfa from states infested with alfalfa weevil because Congress had given the Secretary of Agriculture power to declare interstate plant quarantines, even though he had not acted; where state courts had jurisdiction to entertain suits under a federal statute which necessitated the application of federal substantive law, "incompatible doctrines of local law must give way to principles of Federal labor law," and it has construed the federal wiretapping ban as rejecting such state-obtained evidence in a federal district court, although apparently not rejecting state-obtained wiretap evidence in a state prosecution.¹⁹ However, "It will not be presumed that a fed-

19. *Pennsylvania v. Nelson* (1956) 350 U.S. 497, 76 S.Ct. 477, 100 L. Ed. 640, although in *Uphaus v. Wyman* (1959) 360 U.S. 72, 79 S.Ct. 1040, 3 L.Ed.2d 1090, a state investigation of subversive activities within its borders was upheld; *Farmers Educational & Coop. Union v. WDAY, Inc.* (1959) 360 U.S. 525, 79 S.Ct. 1302, 3 L.Ed.2d 1407; *San Diego Bldg. Trades Council, etc. v. Garmon* (1959) 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775, and see also *Forkosch, Jurisdiction (of the N.L.R.B.) and Its Impact on State Powers*, 16 *Ohio St.L.Jl.* 301 (1955); *Oregon-Washington R. R. & Nav. Co. v. Washington* (1926) 270 U.S. 87, 46 S.Ct. 279, 70 L.Ed. 482; *Local 174 Teamsters v. Lucas Flour Co.* (1962) 369 U.S. 95, 82 S.Ct. 571, 7 L.Ed.2d 593 involving § 301 of the Taft-Hartley Act; in general see also opinion by Justice

Douglas in *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447.

On the wiretapping, see *Nardone v. United States* (1937) 302 U.S. 379, 58 S.Ct. 275, 82 L.Ed. 314 (rejecting federally obtained wiretaps in a federal court), and *Benanti v. United States* (1957) 355 U.S. 96, 78 S.Ct. 155, 2 L.Ed.2d 126 (rejecting state-obtained wiretaps, legal there, as evidence in a federal court); in *Schwartz v. Texas* (1952) 344 U.S. 199, 73 S.Ct. 232, 97 L.Ed. 231, state wiretap evidence was held admissible in a state prosecution, and in *Pugach v. Sullivan* (S.D.N.Y.1960) 180 F.Supp. 67, and (2d Cir. 1960) 277 F.2d 739, the district and Circuit Court refused to enjoin a state court from admitting this evidence, with the Supreme Court affirming sub nom. *Pugach v. Dolinger* (1961) 365 U.S. 458, 81 S.Ct.

eral statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.”²⁰

650, 5 L.Ed.2d 678. See further on this § 337, notes 78, 80, 85.

20. *Schwartz v. Texas*, *supra* note 19, at pp. 202-203.

Part C

RIGHTS OF PERSONS

Chapter XV

THE CONSTITUTION AND THE AMENDMENTS— IN GENERAL

§ 320. Introduction

Our examination of the Constitution to this point has stressed the power-limitation concept; however, we have emphasized the powers of, rather than the limitations upon, the federal and state governments, although in so doing many kinds and types of limitations were discussed, and Chapter XIV highlighted and, in a degree, sought to particularize them. In this Part C we are concerned primarily with the rights of persons,¹ and we shortly emphasize the 14th Amendment's several clauses. But we first do for the Amendments what Chapter I did for the Constitution, namely, examine all of the amendments generally, and in particular only those not heretofore examined (later the 14th Amendment is separately analyzed). Before doing this we re-check the Constitution to highlight rights of persons which may be found in that document.

§ 321. The Constitution and the Rights of Persons

The Constitution itself contains many rights of persons. For example, the Legislative Article discloses these rights by its negating of the powers of the federal and state governments in §§ 9 and 10, respectively. To illustrate, Art. I, § 9, prohibits the federal government from suspending the privilege of *habeas corpus* save in emergencies (§ 307) or passing a bill of attainder (§ 308) or *ex post facto* law (§ 309), and thereby grants rights to persons affected thereby. In Art. I, § 10, the states are forbidden to pass any like bill or law (§ 310), and cannot impair the obligations of contracts (§ 311). The Judicial Article, in § 2, cl. 1, extends the judicial power to citizens, that is, persons who are not aliens, of different states who are suing one another (§ 67), and directs all criminal trials, except impeachments, to be by jury in the state

1. By "persons" we may or may not include corporations, associations, and other groups, depending upon the clause involved, the judicial interpretation accorded it, and the

context of the discussion. Usually the term will include all people, whether citizens, aliens, or Indians, and will also include corporations, etc.

where committed, § 2, cl. 3, and then requires a conviction for treason to be substantively and procedurally limited as set forth in § 3. The Federal Article contains the Full Faith and Credit Clause (§ 76), the Privileges and Immunities Clause (§ 80), and, because of the discretion placed in the hands of the rendering governor, the innocuous Rendition or Extradition Clause (§ 75).

In all of these instances the persons involved or affected obtain some right or privilege which can be made the basis for a judicial inquiry; whether they obtain this right directly or indirectly, affirmatively or negatively, is not here material. There are numerous other constitutional avenues which a person may take, e. g., under the Commerce Clause he may assert the state's inability to use its taxing or police powers (§§ 227, 229), and in this indirect fashion assert a right against the state, but, in general, this type of right is a derivative one; since we seek direct and immediate rights, we limit our inquiry to those clauses under which a party claims a personal right, although this claim may come about because of a limitation put upon the government.

§ 322. The Amendments—In General

As of 1962 there were twenty-three Amendments. The first ten are usually called the Bill of Rights, although it is really only the first eight which should be so termed. These ten were proposed and ratified almost simultaneously with the adoption of the Constitution, namely, in 1789. The eleventh (§ 79) and twelfth were ratified in 1795 and 1804 respectively, and therefore may also be considered to be contemporary. Between these twelve amendments and the three Civil War ones of 1865, 1868, and 1870 respectively, a period of over sixty years elapsed. Between the 15th Amendment of 1870, and the 16th and 17th Amendments of 1913, forty-three years elapsed. Then, in 1919 and 1920 the 18th and 19th Amendments were ratified, in 1933 the 20th and 21st, and in 1951 and 1961 the 22d and 23d. In other words, the time picture is as follows:

<u>Amendment</u>	<u>Year Ratified</u>	<u>Years Elapsed</u>
Constitution Adopted	1789	
11th and 12th Amendments	1795 and 1804	6 and 15
Civil War Amendments (13–15)	1865, 1868, 1870	61
16th and 17th Amendments	1913	43
18th and 19th Amendments	1919, 1920	6
20th and 21st Amendments	1933	13
22d Amendment	1951	18
23d Amendment	1961	10

Those who complain of too many amendments being proposed and ratified are confounded by the fact that since the adoption of

the Constitution in 1789, to 1962, an average of $7\frac{1}{2}$ years have elapsed between each amendment; if we omit the Bill of Rights, which was "promised" as a condition for adoption, then an average of $13\frac{1}{3}$ years have so elapsed; and if we group the 15th and 19th, and the 18th and 21st, then the average lengthens to $15\frac{2}{3}$ years. Regardless, the ability to amend the Constitution has been a balancing force as against the existence of a power, e. g., a judicial decision that a citizen may sue a state, which resulted in the 11th Amendment (§ 79), or the absence of a power, e. g., the inability of the federal government to impose an income tax, which resulted in the 16th Amendment (§ 69); the existence and use of the amending power has also conduced to better methods of election of and terms for the federal officials (12th, 14th, 15th, 17th, 19th, 20th, 22d, and 23rd Amendments) as well as providing for the President's succession (22d). This analysis permits us to group the amendments (one may appear in more than one group) on a functional basis as follows:

<u>Subject</u>	<u>Amendments</u>
Rights of Persons	I-X, 13, 14, 15, 19
Voting, Elections, Senators and President	12, 14, 15, 17, 19, 20, 22, 23
Suits against states	11
Income tax	16
Prohibition	18, 21

The greatest group of amendments, after the enactment of the Bill of Rights, thus concerns the very practical business of governing, and the 11th and 16th Amendments may even fall into this group; however, if we speak of the rights of persons, and the politics of governing, we have only three other classes of amendments left, namely, suability of states, income tax, and prohibition.

§ 323. — In Particular—The Prohibition Amendments

The 11th and 16th Amendments have already been discussed (§§ 79, 69, and 271) so that we here discuss only the 18th and 21st. These Prohibition Amendments, involved slightly in §§ 233-235, are here discussed briefly. The 21st Amendment repeals the 18th, and in its section 2 then states that "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The practical effect of this provision is to dump the question into the laps of the states, give each local option, and federally cooperate with them in their decisions by having the interstate liquor traffic prohibited

or controlled as so opted.² However, within a decade after the amendment's ratification, the Supreme Court apparently began to uphold the state's control over the interstate liquor traffic upon the basis of the state's police powers which did not unduly burden interstate commerce.³ The 21st Amendment does not bar an anti-trust prosecution where price-fixing and maintenance is charged, nor does it limit the federal war power to fix retail liquor prices.⁴

§ 324. — — The Political Amendments

The political amendments deal with the federal voting methods, ability, and requirements involving the President (12th; 14th, § 2; 15th; 19th; and 23d), his tenure (no more than two terms, 22d), the popular election of senators (17th), and the commencement of the executive and legislative terms of office (the *Lame Duck Congress* is eliminated) as well as providing for the presidential succession (20th). These have been discussed in § 120, and are here mentioned again, but will in particular be further discussed in § 358.

§ 325. — — The Rights of Persons—In General

The rights of persons may be classified in many ways. For example, political philosophers speak of natural rights; the Preamble to the Charter of the United Nations reaffirms its "faith in fundamental human rights," there is a Human Rights Commission, and the general assembly in 1948 adopted a Universal Declaration of Human Rights; our own Declaration of Independence in 1776 held that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness," and in 1947 the United States President's Committee on Civil Rights issued its report, "To Secure These Rights;" and we daily speak of civil,

2. E. g., state discrimination in favor of local liquor is upheld, *State Board of Equalization v. Young's Market Co.* (1936) 299 U.S. 59, 62, 57 S.Ct. 77, 81 L.Ed. 38, as were retaliatory laws against such types of discrimination. *Indianapolis Brewing Co., Inc. v. Liquor Control Commission of Michigan* (1939) 305 U.S. 391, 59 S.Ct. 254, 83 L.Ed. 213. In the former case the court conceded that prior to the 21st Amendment the state's license fee would have been unconstitutional, but held the Amendment had removed this inability. The amendment does not give states control over liquor shipments into federal national parks. *Collins v. Yose-*

mite Park (1938) 304 U.S. 518, 537-538, 58 S.Ct. 1009, 82 L.Ed. 1502.

3. See, e. g., *Ziffrin, Inc. v. Reeves* (1939) 308 U.S. 132, 138, 60 S.Ct. 163, 84 L.Ed. 128, *Duckworth v. Arkansas* (1941) 314 U.S. 390, 62 S.Ct. 311, 86 L.Ed. 294, and *Carter v. Virginia* (1944) 321 U.S. 131, 64 S.Ct. 464, 88 L.Ed. 605.

4. *United States v. Frankfort Distilleries, Inc.* (1945) 324 U.S. 293, 297-299, 65 S.Ct. 661, 89 L.Ed. 951 (see pp. 301-302 for a dissenting view); *Barnett v. Bowles* (En.Ct. App.1945) 151 F.2d 77, 79, cert. den. (1945) 326 U.S. 766, 66 S.Ct. 168, 90 L.Ed. 461.

political,⁵ economic, social, and other rights. Brandeis, early in his career, wrote on the right to privacy and, when upon the bench, felt that "the right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men."⁶ There is a hodge-podge of rights, then, from which different people may draw different claims, so that we must immediately seek to limit our area of study. We do this by concentrating upon those basic rights which appear in the Amendments, namely, the Bill of Rights; we thus eschew philosophical and jurisprudential controversies as to why others are omitted, for we are studying the Constitution and the Amendments, not political theory. However, when we turn to the definition of due process of law, as enunciated by the judiciary, we will see other and different rights being included.

§ 326. — — — Slavery

The 13th Amendment is the only one proposed during the Civil War. This occurred on January 31, 1865, the war terminated that spring, and the amendment was ratified on December 9th. The amendment reproduces faithfully the language of Article 16 of the Northwest Ordinance of 1787, giving it "unrestricted application within the United States,"⁷ and is comparatively simple: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." The language is all-embracing, limits not alone the federal government but also the states, and is likewise applicable to all persons. In addition, it is co-extensive with the flag, since its scope embraces "any place subject to their jurisdiction." There is no other constitutional clause, or amendment, which is so broad, unlimited and self-enforcing, i. e., although in § 2 Congress is given power to enforce the amendment by appropriate legislation, even in its absence a person can enforce his rights thereunder in the courts.⁸ Within eight years of its ratification the amendment was construed as not applying "to servitudes, which may have been attached to property in certain localities," but to "involuntary" "personal servitude" "which can only

5. For voting rights, see, e. g., §§ 147-148, and 358.

6. Warren and Brandeis, *The Right to Privacy*, 4 *Harv.L.Rev.* 193 (1890), and *Olmstead v. United States* (1928) 277 U.S. 438, 478, 48 S.Ct. 564, 72 L.Ed. 944 (dissenting, with Holmes and Stone concurring in his dissent).

7. *Bailey v. Alabama* (1911) 219 U.S. 219, 240, 31 S.Ct. 145, 55 L.Ed. 191.

8. *Civil Rights Cases* (1883) 109 U.S. 3, 20, 3 S.Ct. 18, 27 L.Ed. 835. Legislation abolishing peonage and imposing penalties was upheld in *Clyatt v. United States* (1905) 197 U.S. 207, 218, 25 S.Ct. 429, 49 L.Ed. 726; see also *United States v. Gaskin* (1944) 320 U.S. 527, 529, 64 S.Ct. 318, 88 L.Ed. 287.

apply to human beings. . . . The word servitude is of larger meaning than slavery”⁹

The term servitude comprehends any kind of enforced servitude, including peonage,¹⁰ even though a statutory presumption is used in an effort to create a legal bridge between the breach of a contract and an intent to defraud.¹¹ There is, however, no involuntary servitude in, for example, the usual type of racial discrimination; seamen’s services; “Enforcement of those duties which individuals owe the State, such as service in the army, militia, on the jury, etc.,” jailing for a failure to furnish constitutionally-required water, heat, light, etc.; making it a crime to coerce broadcasters to employ surplus musicians; and in enjoining employees from work stoppages.¹²

§ 327. The Bill of Rights—In General—As Substantive and Procedural Limitations Upon the Federal Government

In § 325 the mass of political and social rights, to mention but these, was suggested as worthy of investigation, but we limited ourselves to those of the Bill of Rights. The background of these first amendments returns us to the Declaration of Independence, and the “unalienable Rights” there enumerated which then became the object of government, namely, “That to secure these rights, Governments are instituted” The government the colonists thereafter instituted, that is, under the Articles of Confederation, found the States entering “into a firm league of friendship with each other, for . . . the security of their liberties, and their mutual and general welfare” (Art. III), although nowhere else are the rights of persons otherwise implied; and the Constitution, in its Preamble, likewise uses such

9. Slaughter-House Cases (1873) 16 Wall. 36, 69, 71, 72, 21 L.Ed. 394, thus forbidding any kind of slavery, and applying to “Mexican peonage or the Chinese coolie labor system” See also *Hodges v. United States* (1906) 203 U.S. 1, 16-17, 27 S.Ct. 6, 51 L.Ed. 65.

10. The Peonage Cases (D.C.Ala. 1903) 123 Fed. 671, where defaulting sharecroppers were imprisoned, thereby coercing payment of a civil liability arising from breach of contract.

11. The Bailey case, *supra* note 7. See also *United States v. Reynolds* (1914) 235 U.S. 133, 35 S.Ct. 86, 59 L.Ed. 162, invalidating a third Alabama effort along the same lines, *Taylor v. Georgia* (1942) 315 U.S. 25, 62 S.Ct. 415, 86 L.Ed. 615, and

Pollock v. Williams (1944) 322 U.S. 4, 64 S.Ct. 792, 88 L.Ed. 1095, invalidating like Georgia and Florida statutes, although see dissenting opinion at p. 27 of latter case.

12. Civil Rights Cases, *supra* note 8, at pp. 23-25, *Hodges v. United States* (1906) 203 U.S. 1, 27 S.Ct. 6, 51 L.Ed. 65; *Robertson v. Baldwin* (1897) 165 U.S. 275, 282, 17 S.Ct. 326, 41 L.Ed. 715; *Butler v. Perry* (1916) 240 U.S. 328, 333, 36 S.Ct. 258, 60 L.Ed. 672; *Brown (Marcus) Holding Co. v. Feldman* (1921) 256 U.S. 170, 41 S.Ct. 465, 65 L.Ed. 877; *United States v. Petrillo* (1947) 332 U.S. 1, 12-13, 67 S.Ct. 1538, 91 L.Ed. 1877; *International Union, UAW v. Wisconsin Employment Relations Board* (1949) 336 U.S. 245, 69 S.Ct. 516, 93 L.Ed. 651.

general language. With this heritage of "unalienable Rights" for which they had fought a revolution, it is no wonder that many of the ratifying state conventions withheld their support of the proposed Constitution unless some form of these "unalienable Rights" was promised and guaranteed. "Without this concession the Constitution might never have been adopted."¹³ For example, the Virginia ratifying convention approved by a bare ten votes, but the Federalists had to promise a bill of rights; in New York the margin was three votes, and again a bill of rights was required as a condition; in 1788 North Carolina rejected the proposed Constitution unless a bill of rights, and other amendments, were added, and in 1789, after Congress had submitted its twelve proposals, that state ratified; and so it went.¹⁴ To honor these promises, Madison introduced a series of amendments at the first Congress,¹⁵ but of the seventeen accepted by the House two were rejected by the Senate, and these fifteen were then compressed into twelve. The states ratified ten of these twelve, and these became the Bill of Rights.¹⁶

The 9th and 10th Amendments are not of particular interest to us here (see, e. g., § 285, note 2), so that only the first eight amendments of the Bill of Rights are discussed. The sections which follow examine sixteen of the various clauses found in these eight amendments, and it is important to note that it is the federal government, and not the states, which are limited by these rights. The reasons go back to one of the amendments, proposed by Madison in 1789, but which the Senate refused to accept; that amendment, "the most valuable of the whole list" according to its proposer, read: "The equal rights of conscience, the freedom of speech or of the press, and the right of trial by jury in criminal cases, shall not be infringed by any State."¹⁷ Another reason has to do with the language of the amendments, for only in the 1st and 7th are "Congress" and the "United States" mentioned as the specific sovereigns being limited, so that a good argument may be made that all the others limit either the states alone or both the

13. Ferguson and McHenry, *The American System of Government* (1956) p. 41.

14. The Northwest Ordinance of 1787, adopted by the Congress of the Confederation, in its Articles 2 and 6, contained many of the rights thereafter found in the Bill of Rights. The Founding Fathers had rejected a proposal by Gerry and Mason for a Bill, probably due to the time element, and perhaps to the feelings later expressed by Hamilton in No. 84 of *The Federalist*.

15. See, on the reason why, *Monongahela Navigation Co. v. United States* (1893) 148 U.S. 312, 324, 13 S.Ct. 622, 37 L.Ed. 463.

16. One of these two, ratified by ten states (11 ratifications were then required, as there were 14 states), concerned the ratio of House representation to population, and the other, ratified by six states, prevented any pay changes for Congressmen from being effective until an intervening election of representatives.

17. 1 *Annals of Congress* 755.

federal and the state governments. In other words, protections against the states were also before the Congress, and the amendments are not too clear, so that these early desires continued into a legal effort to have the entirety of the Bill of Rights act upon the states also. In 1833 Marshall rejected this first effort,¹⁸ but assaults continued and are still before, and rejected by, the Supreme Court.¹⁹ After 1868, when the 14th Amendment was ratified, the use of its Privileges and Immunities Clause²⁰ but primarily its Due Process Clause, as a specific limitation upon the states, was now urged as having incorporated the Bill of Rights within its prohibitions (§ 334, Chaps. XVIII–XIX). This new effort “has been rejected by this Court again and again, after impressive consideration.”²¹

This effort at direct incorporation will not be upheld, as we later will see, but limiting concepts, if not clauses, found in certain of the provisions of the Bill of Rights, will likewise be found in the 14th Amendment’s Due Process Clause, so that by indirect osmosis, if not directly, these will now become limitations upon the states. In view of the fact that all of the 1st Amendment’s rights have become limitations upon the states in this fashion, and because of the dearth of litigation involving the federal government in the overall rights areas, not much consideration will here be given to these freedoms; they will be given extended discussion in later chapters, and we will also discuss whether the rights are absolutes (we may anticipate by saying they are not so held to be).

§ 328. — In Particular *—Substantive—Freedom of Religion

The 1st Amendment says that “Congress shall make no law respecting an establishment of religion” This does not

18. *Barron v. Baltimore* (1833) 7 Pet. 243, 8 L.Ed. 672.

19. See, e. g., Warren, *The New “Liberty” Under the Fourteenth Amendment*, 39 Harv.L.Rev. 431, 436 (1926), stating that at least twenty cases between 1877 and 1907 urged this contention and required the Supreme Court “to rule upon this point and to reaffirm Marshall’s decision of 1833” In discussing the 14th Amendment, however, we will go further into this, §§ 377–378, and also see that some of the concepts or clauses found in the Bill of Rights will also be found in that later amendment, so that the states are limited to some parallel extent.

20. See discussion in *Twining v. New Jersey* (1908) 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97, rejecting each

one of the first eight amendments as being part of the 14th Amendment’s P & I Clause, and then discussing the question whether the privilege against self-incrimination was included in the 14th Amendment’s Due Process Clause; the court said no. See also §§ 377–378.

21. *Wolf v. Colorado* (1949) 338 U.S. 25, 26, 69 S.Ct. 1359, 93 L.Ed. 1782 (although see reversal in § 337, and also discussed in §§ 377–378).

* The several aspects hereafter to be discussed, both substantive and procedural, of the Bill of Rights, as limitations upon the federal government, should be considered in connection with Chapters XVIII and XIX, which discuss these aspects as limitations upon the states. In several instances there is a di-

mean that (religious) polygamy is permitted; or that religion may excuse a violation of the white slave law; or that exemption is possible from a required course of military training; or that one may, upon grounds of religious belief, knowingly counsel another not to register for selective service; or conceivably that the mails can be used to obtain money by fraud which consists of a false claim of religious belief.²² Contrariwise, a state's Sunday non-work statute, designed to enforce its observance as a religious duty, was unenforceable by the government,²³ but the latter was able to contract to erect a hospital for the poor in the District of Columbia despite the fact that the corporation belonged to a monastic order of a particular religion;²⁴ however, it could not refuse naturalization, under the terms of the statute, to an alien willing to serve as a non-combatant and take the oath of allegiance, but who did not desire to bear arms because of religious beliefs.²⁵ In 1889 a federal appropriation of \$3,000,000 was made pursuant to a treaty with the Sioux Indians; one-half of the interest was to be expended to promote "industrial and other suitable education among said Indians;" a subsequent 1897 statute declared it to be federal policy that "no appropriation whatever [be made] for education in any sectarian school;" the Indian Commissioner, in his administering discretion, contracted with the Bureau of Catholic Indian Missions to pay them the sum of \$27,000 "for the care, education and maintenance . . . [of a number of Sioux children] at a sectarian school on the said Rosebud reservation;" this was unanimously upheld because no appropriation as such was involved, the money was owned by the Indians, and they could

rect correlation, e. g., §§ 328 and 399, 329 and 400, so that what is said in one section as a limitation upon the federal government may be used in the other as a limitation upon the states, and vice versa. There are differences, however, and this is not an all-inclusive general rule in this text; subject to this caveat, the corresponding coverages in federal and state discussions should be compared.

22. *Reynolds v. United States* (1878) 98 U.S. 145, 25 L.Ed. 244; *Church of Latter-Day Saints v. United States* (1890) 136 U.S. 1, 10 S.Ct. 792, 34 L.Ed. 478; *Hamilton v. Regents of Univ. of Calif.* (1934) 293 U.S. 245, 55 S.Ct. 197, 79 L.Ed. 343, although by statute the Congress may grant exemption from military service outright or conditionally, e. g., 50 U.S.C.A.App. § 456(j) (1951), *Roodenko v. United States* (10th Cir. 1944) 147 F.2d 752, cert.

den. (1945) 324 U.S. 860, 65 S.Ct. 864, 89 L.Ed. 1417; *Gara v. United States* (10th Cir. 1949) 177 F.2d 596, affd. eq.div.ct., (1950) 340 U.S. 857, 71 S.Ct. 87, 95 L.Ed. 628; *United States v. Ballard* (1944) 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148, and *Ballard v. United States* (1946) 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 181.

23. *District of Columbia v. Robinson* (1908) 30 App.D.C. 283, 12 Ann. Cas. 1094, and see also *Church of the Holy Trinity v. United States* (1892) 143 U.S. 457, 471, 12 S.Ct. 511, 36 L.Ed. 226.
24. *Bradfield v. Roberts* (1899) 175 U.S. 291, 20 S.Ct. 121, 44 L.Ed. 168.
25. *Girouard v. United States* (1946) 328 U.S. 61, 66 S.Ct. 826, 90 L.Ed. 1084; see also *Cohnstaedt v. Immigration & Naturalization Service* (1950) 339 U.S. 901, 70 S.Ct. 516, 94 L.Ed. 1331.

spend it as they pleased.²⁶ The only provision in the Constitution concerning religion is found in Article VI, cl. 3, which states that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Other aspects of the religious clause, insofar as the states are concerned, and which aid in understanding this section, are found in § 399.

§ 329. — — — Freedom of Speech and Association²⁷

A beginning must be made in this, as in any other area, and we adopt the words of Justice Douglas which unquestionably are acceptable, that "free speech is the rule, not the exception," and yet "There comes a time when even speech loses its constitutional immunity. . . . When conditions are so critical that there will be no time to avoid the evil that the speech threatens, it is time to call a halt. Otherwise, free speech which is the strength of the Nation will be the cause of its destruction."²⁸

The Alien and Sedition Acts of 1798, enacted respectively on June 25 and July 14, extended the required period of residence for naturalization from five to fourteen years, made all alien subjects of an enemy nation liable to arrest, and later made it illegal to print, publish, etc. "any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President," etc.²⁹ The Sedition Act expired by its own terms on March 3, 1801, but about 25 arrests, and 15 indictments, occurred while it was in force; there were 10 convictions, and the validity of the statute was upheld by the federal circuit courts, and in three instances by Supreme Court Justices while sitting there. After Jefferson was elected he pardoned all who had been convicted and Congress eventually repaid a majority of the fines. It was not until the first World War that Congress again legislated in this area of free speech, but this time the Supreme Court upheld a conviction for a conspiracy wilfully to obstruct recruiting and enlistment in the armed forces. Although "the right to free speech was not referred to specially" by the defendants, Holmes "thought fit to add a few words." He felt that "the character

26. *Quick Bear v. Leupp* (1908) 210 U.S. 50, 51-52, 28 S.Ct. 690, 52 L. Ed. 954.

27. The two concepts of speech and association are discussed as one, and cases are used interchangeably.

28. *Dennis v. United States* (1951) 341 U.S. 494, 585, 71 S.Ct. 857, 95 L.Ed. 1137, dissenting. Of course the questions remain, who is to de-

cide, and how, when the "time" has come, and when the conditions are "so critical." This is what the present discussion brings up.

29. 1 Stat. 566, 577, 596 (1798). For details, and on what else is here given, see *Beauharnais v. Illinois* (1952) 343 U.S. 250, 287, 72 S.Ct. 725, 96 L.Ed. 919, dissent by Jackson, and Emerson and Haber, *Political and Civil Rights in the United States* (1952) pp. 367-371.

of every act depends upon the circumstances in which it is done. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.”³⁰

This “clear and present danger” test requires: (1) that the crime or statute be one which Congress has power to create or enact, so that it is a valid and enforceable statute upon general constitutional principles studied to this point; (2) that the evils which this otherwise valid statute seeks to prevent are now probably about to occur in the very near (almost immediate) present, not some day in even the close or near future;³¹ and (3) that the violation be clearly and beyond question one which will occur unless restrained.³²

In the 1951 Dennis case Chief Justice Vinson termed the Holmes statement of the test a “classic dictum,” which was “considerably weakened” by Holmes at the end of his opinion; Vinson, and on behalf of three other Justices, felt that Chief Judge Learned Hand’s approach, in the affirming opinion below, was better phrased, and “We adopt this statement of the rule,” namely, “In each case [courts] must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.” The concurring opinion of Justice Frankfurter reviewed the case history of the Holmes test and concluded that “It were far better that the phrase be abandoned than that it be sounded once more,” while the concurring opinion of Justice Jackson “would save it, unmodified, for application as a ‘rule of reason’ in the kind of case for which it was devised,” not the one before him. The dissenting opinion of Justice Black would retain the test, but “at least as to speech in the realm of public matters, I believe . . . [it] does not

30. *Schenck v. United States* (1919) 249 U.S. 47, 52, 39 S.Ct. 247, 63 L. Ed. 470. The court was unanimous. We do not give any historical development of the free speech concept, as several of the opinions cited so do, e. g., Chief Justice Vinson, and Justices Frankfurter, Jackson, and Douglas in the Dennis case, supra note 28.

31. See also *Abrams v. United States* (1920) 250 U.S. 616, 627, 40 S.Ct. 17, 63 L.Ed. 1173, and for extended discussion see Appendix to concurring opinion of Frankfurter in the Dennis case, supra note 28, at p. 556, who gives eight cases and quotations disclosing “Opinions re-

sponsible for the view that speech could not constitutionally be restricted unless there would result from it an imminent—i. e., close at hand—substantive evil.” See also the 4-Justice majority opinion in this case at pp. 503–511, and concurring one of Jackson at p. 568, fn. 12, showing the cases have used extreme adverbs in pushing the requirements of the test to far reaches.

32. See also the criticism of this test by Freund, *On Understanding the Supreme Court* (1950) pp. 27–28, quoted by Frankfurter in the Dennis case, supra note 28, at pp. 542–543.

Clear
& Present
Danger

'mark the furthestmost constitutional boundaries of protected expression' but does 'no more than recognize a minimum compulsion of the Bill of Rights.'" The dissent of Justice Douglas speaks of and apparently uses the test, without criticism.³³ Apparently the court is returning to a pragmatic approach to each set of facts, rather than utilizing any standard or guide which is itself unclear or ambiguous, so that the "balancing" formula of Hand itself becomes just another tool in the legalistic kit.³⁴

To what extent has free speech been protected or restricted by the Supreme Court? Briefly phrased, and for the federal jurisdiction only, the Court, in 1957, by four of the Justices, now divided "advocacy of abstract doctrine [from] . . . advocacy at promoting unlawful action," and held that only the latter could be statutorily denounced; exclusion, naturalization, and deportation cases apparently are within the reach of Congress, even though pertinent statutes are subject to the strictest standards of proof; a statutory requirement that officers of unions desiring to avail themselves of the services of the N.L.R.B. first had to file non-Communist affidavits, might infringe upon the exercise of political rights but was not presumptively invalid; conspiracies to obstruct the recruitment and enlistment of soldiers are not protected by free speech; a conspiracy to teach or advocate the overthrow of the government by force or violence is likewise not so protected; nor are newspaper publishers protected when they run afoul of the antitrust laws; however, a bus company, enjoying a substantial monopoly of transportation in the nation's capital, was permitted to install radio receivers in its buses to spew forth

33. *Supra* note 28, at pp. 503, 504, 510, 544, 568, 580, and 585-587, respectively. Justice Clark did not participate, so that 4 Justices were in the so-called majority adopting the Hand version, one would reject it altogether, a sixth would save it for application in its restricted area, and two (dissenters) would apparently use it but only for minimum, not maximum, purposes.

34. Although Frankfurter desires to abandon the Holmes test he does not clearly adopt any to replace it although, at p. 529, he starts his examination of cases by saying that "We have recognized and resolved conflicts between speech and competing interests in six different types of cases." Does he thereby accept, or at least use, the Hand formula? At p. 539 he concludes his examination by saying: "I must leave to others the ungrateful task of trying to reconcile all

these decisions." And especially see his handling of one case at pp. 532-533.

The balancing formula still requires subjective evaluations, individual decisions as to burden of proof, *per se* and *prima facie* applications, and a host of like soul-searching determinations, which in effect permits a see-saw balancing technique in which one end is weighted now, the other later, etc., all depending upon factors which in the nature of the method cannot be objective in a complete way. In other words, the see-saw is thus balanced in favor of the government end, or in favor of the individual end, and a complete balance is seldom, if ever, obtained. See also McCloskey, *Deeds Without Doctrines*, etc. 56 *Pol.Sci.Rev.* 71, 75 (1962) giving an excellent analysis of the numerous federal and state laws and decisions.

commercial to the captive riders, the court holding the 1st Amendment not applicable; the Justices denounced a listing by the Attorney General of a committee as communist although questionably so because of free speech; permitted a prohibition of a secondary boycott in violation of a statute against a plea of free speech; upheld a restriction upon the expression of political views or of political association by governmental employees, and upon coercive expressions of employers in violation of the statutory rights of their employees to organize; affirmed a conviction of a book publisher and vendor who sold through the mails because of the mailing of obscene circulars and advertising; upheld a conviction of a witness for a contempt of a Congressional investigating committee when he refused to divulge the names of bulk purchasers of books from his lobbying organization, a majority refusing to pass upon the free speech question, although in a later case upheld an otherwise cooperative and candid witness' refusal to reveal people with whom he had associated but whom he did not know to be members of the Communist Party; in another case the Court, in the language of the dissenters, "today affirms, and thereby sanctions, the use of the [Congressional] contempt power to enforce questioning by congressional committees in the realm of speech and association;" and in § 340 and § 400 references to analogous and additional holdings are given in other federal and state matters.³⁵

35. In general, see Frankfurter's opinion in the Dennis case, *supra* note 28, at p. 529 et seq., and in particular see, on the cases for the situations mentioned, respectively: *Yates v. United States* (1957) 354 U.S. 298, 322, 77 S.Ct. 1064, 1 L.Ed. 2d 1356, also quoting from the Dennis concurrence of Frankfurter, at p. 545; *United States v. Macintosh* (1931) 283 U.S. 605, 615, 51 S.Ct. 570, 75 L.Ed. 1302, overruled as to naturalization but not exclusion in *Girouard v. United States* (1946) 328 U.S. 61, 66 S.Ct. 826, 90 L.Ed. 1048, *Schneiderman v. United States* (1943) 320 U.S. 118, 63 S.Ct. 133, 87 L.Ed. 1796; *American Communications Ass'n v. Douds* (1950) 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925, *Schenck v. United States*, *supra* note 30, *Debs v. United States* (1919) 249 U.S. 211, 39 S.Ct. 252, 63 L.Ed. 566; the Dennis case, *supra* note 28; *Associated Press v. United States* (1945)

326 U.S. 1, 7, 65 S.Ct. 1416, 89 L. Ed. 2013; *Public Utilities Commission v. Pollak* (1952) 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068; *International Brotherhood v. N.L.R.B.* (1951) 341 U.S. 394, 71 S.Ct. 954, 95 L.Ed. 1299; *United Public Workers of America v. Mitchell* (1947) 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754; *N.L.R.B. v. Ford Motor Co.* (6th Cir. 1940) 114 F.2d 905, cert. den. (1941) 312 U.S. 689, 61 S.Ct. 621, 85 L.Ed. 1126; *Roth v. United States* (1957) 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498; *United States v. Rumely* (1953) 345 U.S. 41, 73 S.Ct. 543, 97 L.Ed. 494; *Watkins v. United States* (1957) 354 U.S. 178, 77 S.Ct. 1173, 1 L.Ed.2d 1273; and see also *Wilkinson v. United States* (1961) 365 U.S. 399, 81 S.Ct. 567, 5 L.Ed.2d 633, and *Braden v. United States* (1961) 365 U.S. 431, 81 S.Ct. 584, 5 L.Ed.2d 653. See also § 400, note 133, *infra*.

§ 330. — — — Freedom of Press—Broadcasting

The broad protections discussed in § 329, and the general rule enunciated there at the outset, apply here. There can be no previous restraint, although the press cannot escape later civil or even criminal liability for its publications, e. g., a newspaper's "rights may be abused by using speech or press or assembly in order to incite to violence and crime."³⁶ Just as is a private employer, so is the press subject to the antitrust statutes, and can be enjoined from attempting to monopolize interstate commerce; it is also subject to the labor-management relations acts, as well as to the wage and hour statutes, to mention but these two other federal acts; libel and obscenity laws are civilly and criminally applicable, as are the espionage and other statutes against conspiracy, i. e., to overthrow the government by force and violence; and publishers may also not refuse to cooperate with Congressional investigating committees. In § 401 other methods of attempted control of the press are disclosed, and these would be equally applicable in the federal area. Because of the public ownership concept as applied to the air waves, broadcasting in all its aspects is subject to federal licensing requirements, but the area of the 1st Amendment requirements applies after such a license has been obtained.³⁷

§ 331. — — — The Right to Assemble and Petition

The cases dealing with these rights are mostly in the state jurisdictions, and § 402 discusses them; however, in 1876 Chief Justice Waite formulated the principles here applicable to the federal government:

"The particular Amendment now under consideration assumes the existence of the right of the people to assemble

36. *Near v. Minnesota* (1931) 283 U. S. 697, 51 S.Ct. 625, 75 L.Ed. 1357, and *DeJonge v. Oregon* (1937) 299 U.S. 353, 364, 57 S.Ct. 255, 81 L. Ed. 278.

37. *Associated Press v. United States*, supra note 35, *Lorain Journal Co. v. United States* (1951) 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162, *Associated Press v. N.L.R.B.* (1937) 301 U.S. 103, 57 S.Ct. 650, 81 L.Ed. 953, *Oklahoma Press Publishing Co. v. Walling* (1946) 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614; *Roth v. United States*, supra note 35, and the *Dennis* case, supra note 28, at p. 504, where the Chief Justice gives cases involving pamphlets, etc. which subjected their writers and publishers to criminal prosecu-

tion; *United States v. Rumely*, supra note 35, even though the charge of contempt was dismissed because of a statutory interpretation.

For illustrative materials, citations, etc., see *Emerson & Haber*, supra note 29, pp. 782-794, the authors writing that the F.C.C. claims that renewals of licenses are to be granted under its statutory mandate when broadcasting content is in accord with that law; the industry disagrees; however, whenever challenged, the courts have upheld the Commission, citing, amongst others, *Simmons v. F. C. C.* (App.D.C.1948) 169 F.2d 670, cert. den. (1948) 335 U.S. 846, 69 S. Ct. 57, 93 L.Ed. 396.

for lawful purposes, and protects it against encroachment by Congress. The right was not created by the Amendment; neither was its continuance guarantied, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States.

"The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government, is an attribute of national citizenship and, as such, under the protection of and guarantied by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. . . ." ³⁸

This right of peaceable assembly is one "cognate to those of free speech and free press and is equally fundamental," so that "peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score." ³⁹ Any prosecution must therefore be for reasons other than the above, or else must tie in these meetings as part of a wilful conspiracy to violate a valid law, i. e., the purpose of the meeting is other than for one constitutionally protected.

§ 332. — — — The Right to Bear Arms

The 2d Amendment states as a fact that "A well regulated Militia, being necessary to the security of a free State," and then in effect concludes that "the right of the people to keep and bear Arms, shall not be infringed." This merely means that Congress shall not infringe this right,⁴⁰ but states may declare it unlawful to carry a pistol, brass knuckles, or any other like weapon. Congress has cooperated through the National Firearms Act, which regulates the interstate transportation of firearms.⁴¹ States

38. *United States v. Cruikshank* (1876) 92 U.S. 542, 552, 23 L.Ed. 588. See also *Collins v. Hardyman* (1951) 341 U.S. 651, 653, 71 S.Ct. 937, 95 L.Ed. 1253.

39. *DeJonge v. Oregon*, *supra* note 36, at pp. 364-365. See also § 402 on this clause.

40. *Miller v. Texas* (1894) 153 U.S. 535, 14 S.Ct. 874, 38 L.Ed. 812; see also *United States v. Cruikshank*, *supra* note 38 (infringement

of the right by private persons not within scope of amendment); *Arver v. United States* (1918) 245 U.S. 366, 38 S.Ct. 159, 62 L.Ed. 349, and *Strickland v. State* (1911) 137 Ga. 1, 72 S.E. 260.

41. *Robertson v. Baldwin* (1897) 165 U.S. 275, 17 S.Ct. 326, 41 L.Ed. 715; *United States v. Miller* (1939) 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206. The statute defines a firearm to mean a shotgun, rifle, etc.

may also forbid military organizations or drilling,⁴² and under Art. I, § 8, cl. 15, Congress is given power "To provide for calling forth the Militia to execute the Laws of the Union, suppress insurrections and repel invasions." This amendment is unimportant.

§ 333. — — — Quartering of Soldiers

The 3d Amendment prohibits absolutely the quartering of soldiers in any person's house, without his consent, during times of peace; in times of war, however, this is permitted, provided it is "in a manner prescribed by law." The amendment undoubtedly reflects the Declaration of Independence in which the colonies "let Facts be submitted to a candid world" to prove why they had rebelled. One of these facts was that the King of Great Britain had given "his Assent to their acts of pretended legislation: For quartering large bodies of armed troops among us." It has become historically unimportant.

§ 334. — — — Due Process of Law—In General

The Due Process Clause of the 5th Amendment states that "No person shall . . . be deprived of life, liberty, or property, without due process of law." The 14th Amendment's like clause is that "No State . . . shall deprive any person of life, liberty, or property, without due process of law." In Chapter XVIII we go into greater detail on the background, analysis, and development of the latter clause, but here it is sufficient to point out that both clauses permit a simple dichotomy to be made into a substantive and a procedural portion, i. e., life, liberty, and property are things of substance, while due process of law is a procedure. Thus two questions immediately present themselves, namely, what is the substantive definition or content of life, liberty, and property, and, what are the procedures involved in due process?^{42a} The first is discussed in § 335, and the second in § 344.

A *caveat* may well be stated at the outset. The language of both clauses being so remarkably similar as to be almost identical, save that the 5th limits the federal government,⁴³ and the

with a barrel less than 18" in length.

42. *Presser v. Illinois* (1886) 116 U.S. 252, 6 S.Ct. 580, 29 L.Ed. 615, not a violation of a federal Privilege and Immunity.

42a. "Congress, of course, does not have the final say as to what constitutes due process" *State Bd. of Ins. v. Todd Shipyards Corp.* (1962) 370 U.S. 451, 457, 82 S.Ct. 1380, 8 L.Ed.2d 620.

43. This includes the District of Columbia and incorporated territor-

ies, but not of its own force to unincorporated territories, nor enemy alien belligerents tried outside the country. *Wight v. Davidson* (1901) 181 U.S. 371, 384, 21 S.Ct. 616, 45 L.Ed. 900, *Lovato v. New Mexico* (1916) 242 U.S. 199, 201, 37 S.Ct. 107, 61 L.Ed. 244, *Public Utility Commissioners v. Ynehausti & Co.* (1920) 251 U.S. 401, 406, 40 S.Ct. 277, 64 L.Ed. 327, *Johnson v. Eisentrager* (1950) 339 U.S. 763, 70 S.Ct. 936, 94 L.Ed. 1255.

We do not go into any historical background of the concept of due

14th limits the states, one may initially assume that separate analyses are not required. In general this is not an incorrect assumption, which is why much is left for Chapter XVIII, but it is not a wholly correct one. For example, the 5th Amendment contains an Eminent Domain Clause (§ 336) but there is no like limitation upon the states; can any general state limitation be so construed as to include a like prohibition? If this is so, as our analysis of the 14th Due Process Clause Substantive will show, does this mean that the 5th Due Process Clause Substantive is likewise to be so construed? Obviously not, as a specific limitation exists elsewhere. Similarly on a procedural level, for in the 6th Amendment there is a right to the assistance of counsel granted to all defendants in all federal criminal matters (§ 341), and while no like specific limitation is found upon the states, still, in analyzing the 14th Due Process Clause Procedural, a portion of its concepts will be utilized; and again, the 5th Due Process Clause Procedural cannot be so interpreted.

But as a matter of interpretation the converse of these two illustrations may also be used, namely, that the two clauses are to be interpreted alike. Thus, to illustrate this approach, a defendant in a state murder trial claims to be entitled to be indicted for the crime, and enters a plea under the 14th Due Process Clause; the court may now reject the contention because in the 5th Amendment a specific right is there found in federal criminal matters to an indictment, as well as a separate and specific right to due process of law, and "we are forbidden to assume, without clear reason to the contrary, that any part of this most important [5th] amendment is superfluous;" therefore, since "the same phrase was employed in the Fourteenth Amendment to restrain the action of the States, [we must conclude that] it was used in the same sense and with no greater extent; and that if in the adoption of that amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the States, it would have embodied, as did the Fifth Amendment, express declarations to that effect."⁴⁴ However, a decade later, the Justice who dissented in this case now wrote the opinion holding that the 14th does not permit a state to appropriate private property without just compensation, even though the 5th has a like specific clause,⁴⁵ and four years later the court felt that "it may be that questions may arise in which different constructions and applications of their [5th and 14th Due Process] provisions

process. See, in general, McGehee, *Due Process of Law* (1906) pp. 3-26, and Mott, *Due Process of Law* (1926) pp. 1-5.

44. *Hurtado v. California* (1884) 110 U.S. 516, 534-535, 4 S.Ct. 111, 28

L.Ed. 232; see also *In re Kemmler* (1880) 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519.

45. *Chicago, Burlington & Quincy R. Co. v. Chicago* (1897) 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979.

may be proper.”⁴⁶ Today, of course, the 14th’s Clause is given a broad and substantive interpretation,⁴⁷ and it appears to be having a like broadening effect upon the 5th’s Clause.⁴⁸

Thus while the 5th and 14th Due Process Clauses cannot be interpreted alike, in general we may speak of them as being so interpreted although being careful not to overlook this *caveat*.

§ 335. — — — Substantive

The three terms, life, liberty, or property, “are equivalent to the rights” “to life, liberty and the pursuit of happiness,” and are “fundamental rights,”⁴⁹ which “are representative terms, and intended to cover every right, to which a member of the body politic is entitled under the law. These terms include the right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrests, the right freely to buy and sell as others may. Indeed, they may embrace all our liberties, personal, civil, and political, including the rights to labor, to contract, to terminate contracts, and to acquire property.”⁵⁰

These terms thus embrace all valuable interests a man can possess, including the right to use, lease, and dispose of property, and the right to intangibles, such as the right to make valid contracts, the right to a lien, judgment, etc.⁵¹ Its interpretation has varied, e. g., the court originally held invalid a federal minimum wage for the District of Columbia, but later expressly repudiated this; at first it felt that an employer could not be restrained from threatening to fire an employee if he joined a union, and later it held otherwise; and in 1958 the Court felt that the right to travel

46. *French v. Barber Asphalt Paving Co.* (1901) 181 U.S. 324, 328, 21 S.Ct. 625, 45 L.Ed. 879.

47. See, e. g., beginning with the faint glimmerings by Taney in *Dred Scott v. Sandford* (1857) 19 How. 393, 450–451, 15 L.Ed. 691 federally, and *Wynhamer v. People* (1856) 13 N.Y. 358, locally into an accepted fact in *Whitney v. California* (1927) 274 U.S. 357, 373, 47 S.Ct. 641, 71 L.Ed. 1095, per Brandeis, dissenting.

48. See, e. g., *Bolling v. Sharpe* (1954) 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 591, in effect incorporating an Equal Protection Clause, but quare, is this solely for denouncing the Negro-White classification? The Supreme Court has previously indicated the federal government is not bound by this Clause, *Detroit*

Bank v. United States (1941) 317 U.S. 329, 63 S.Ct. 297, 87 L.Ed. 304, *Helvering v. Lerner Stores Corp.* (1941) 314 U.S. 463, 62 S.Ct. 341, 86 L.Ed. 343, although cf. *Truax v. Corrigan* (1921) 257 U.S. 312, 331, 42 S.Ct. 124, 66 L.Ed. 254, and *Hirabayashi v. United States* (1943) 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774.

49. *Slaughter-House Cases* (1873) 16 Wall. 36, 116, 21 L.Ed. 394, Justice Bradley, dissenting.

50. *Gillespie v. People* (1900) 188 Ill. 176, 182, 58 L.Ed. 1007.

51. *Campbell v. Holt* (1885) 115 U.S. 620, 630, 6 S.Ct. 209, 29 L.Ed. 483; *Terrace v. Thompson* (1923) 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255, *Lynch v. United States* (1934) 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434.

abroad was a substantive liberty.⁵² The clause has been used to void territorial statutes prohibiting foreign-language schools except upon a written permit plus a fee based upon attendance, and one which prohibited Chinese entrepreneurs from keeping their accounts in Chinese.⁵³ In other words, save insofar as there are specific limitations or rights found in other amendments and constitutional clauses, this present limitation may serve as a catch-all.⁵⁴

§ 336. — — — Eminent Domain

The 5th Amendment concludes with the admonition that “nor shall private property be taken for public use, without just compensation.”⁵⁵ This does not imply a grant to the federal government of a power to take, provided it pays; all that is said is that, if, through some other clause, the substantive power to take is independently upheld, then conditions are here placed upon the exercise of that power. This power to take, when placed in conjunction with “for public use,” becomes a limited one. But what or when is a public use is another question, for “What is a public use under one sovereign may not be a public use under another,” and what even one sovereign defines yesterday as a public use it

52. *Adkins v. Children's Hospital* (1923) 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785, repudiated in *West Coast Hotel Co. v. Parrish* (1937) 300 U.S. 379, 400, 57 S.Ct. 578, 81 L.Ed. 703; *Adair v. United States* (1908) 208 U.S. 161, 174, 28 S.Ct. 277, 52 L.Ed. 436, contrary holding in *Phelps Dodge Corp. v. N. L. R. B.* (1941) 313 U.S. 177, 187, 61 S.Ct. 845, 85 L.Ed. 1271; *Kent v. Dulles* (1958) 357 U.S. 116, 78 S.Ct. 1113, 2 L.Ed.2d 1204, *Dayton v. Dulles* (1958) 357 U.S. 144, 78 S.Ct. 1127, 2 L.Ed.2d 1221, although the following year, by denying certiorari, the court upheld a lower determination that Congress had authorized travel restrictions by the President, whose foreign-policy powers also authorized him to prevent a citizen's external travel which might endanger the national interest. *Worthy v. Herter* (1959) 361 U.S. 918, 80 S.Ct. 255, 4 L.Ed.2d 186, lower opinion (1959) 106 U.S. App.D.C. 153, 270 F.2d 905.

53. *Farrington v. Tokushige* (1927) 273 U.S. 284, 47 S.Ct. 406, 71 L.Ed. 646, *Yu Cong Eng v. Trinidad* (1926) 271 U.S. 500, 525, 46 S.Ct. 619, 70 L.Ed. 1059.

54. See, e.g., *Bolling v. Sharpe*, *supra* note 48. See also § 392. The catch-all aspect is further illustrated by the manner in which, although no Contract Clause limitation as is found in Art. I, § 10, prohibits the federal government from impairing the obligations of contracts, the court has attempted to use due process for the same purpose. See, e.g., Chief Justice Chase's opinion in *Hepburn v. Griswold* (1870) 8 Wall. 603, 19 L.Ed. 513, but Justice Miller's dissent denies this; however, Justices Bradley and Field, in dissenting, felt that due process was violated, *Sinking Fund Cases* (1879) 99 U.S. 700, 727, 25 L.Ed. 504, and see also *Coolidge v. Long* (1931) 282 U.S. 582, 51 S.Ct. 306, 75 L.Ed. 562 (involving state and not federal action). See also *Lynch v. United States* (1934) 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434.

55. See also § 139, esp. fns. 77-78, and § 405. On zoning, see, e.g., *Village of Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303.

may not define as one today.⁵⁶ "All private property is held subject to the demands of a public use. The constitutional guaranty of just compensation is not a limitation of the power to take but only a condition of its exercise."⁵⁷ In other words, while all private property may be independently subject to a taking, that taking must be (1) for a public use, and even then it is on condition that (2) just compensation be given. But here the question of what is just enters and, since this may result in a deprivation of property without due process of law, (3) adequate notice and a fair hearing (procedurally) are required.

(1) "The role of the judiciary in determining whether that power [of eminent domain] is being exercised for a public purpose is an extremely narrow one."⁵⁸ The power of eminent domain may be delegated directly or indirectly to a private person,⁵⁹ and public use may be defined as permitting the taking of individual property or even an area for housing rehabilitation, parks, roads, churches, etc., and also permitting aid thereby to be obtained by railroads or public utilities, or in aid of irrigation, logging roads, and even private roads.⁶⁰ But a public nuisance, when destroyed, is not compensable, nor is payment to be made when the army requisitions oil depots and destroys them so as to prevent the advancing enemy from realizing any strategic value therefrom, nor does the destruction of the property of a few require compensation when a fire threatens a whole community and the property and lives of many more are thereby saved, or when a factory is destroyed by soldiers in the field because it is thought to house the germs of a contagious disease.⁶¹ There is also no taking when the United States asserts its superior commerce powers to utilize or regulate the flow of a non-navigable tributary to protect the navigable capacity of a river.⁶² There

56. *United States v. Certain Lands in City of Louisville* (6th Cir. 1935) 78 F.2d 684, 687.

57. *Long Island Water Supply Co. v. Brooklyn* (1897) 166 U.S. 685, 689, 17 S.Ct. 718, 41 L.Ed. 1165, also stating that the government, federal or state, cannot legislate or contract away this power; see also *Hyde Park v. Cemetery Association* (1886) 119 Ill. 141, 7 N.E. 627.

58. *Berman v. Parker* (1954) 348 U.S. 26, 32, 75 S.Ct. 98, 99 L.Ed. 63, and see also language in *Green v. Frazier* (1920) 253 U.S. 233, 241-242, 40 S.Ct. 499, 64 L.Ed. 878.

59. E. g., as in *Strickley v. Highland Boy Gold Mining Co.* (1906) 200 U.S. 527, 26 S.Ct. 301, 50 L.Ed. 581.

60. See, e. g., the *Berman* and *Strickley* cases, *supra* notes 58 and 59, and cases cited, and also *Armstrong v. United States* (1960) 364 U.S. 40, 44, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (materialmen's liens compensable), and *Hairston v. Danville & W. Ry. Co.* (1908) 208 U.S. 598, 606, 28 S.Ct. 331, 52 L.Ed. 637, and *Rindge Co. v. Los Angeles County* (1923) 262 U.S. 700, 43 S.Ct. 689, 67 L.Ed. 1186.

61. *United States v. Caltex (Philippines), Inc.* (1952) 344 U.S. 149, 73 S.Ct. 200, 97 L.Ed. 157; *Richards v. Washington Terminal Co.* (1914) 233 U.S. 546, 34 S.Ct. 654, 58 L.Ed. 1088; and cases cited in these citations.

62. *United States v. Grand River Dam Authority* (1960) 363 U.S. 229,

is, however, a taking by the government when because of its construction and maintenance of locks and dams upon rivers, in aid of navigation, an overflowing of lands by permanent backwater occurs,⁶³ or when there is continued firing across land from a fort, or where airplanes fly so low from an airport about half a mile from a farmer that his property (chickens) is damaged, or property values are reduced because of the noise.⁶⁴

(2) "The word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity' . . . [as] standards."⁶⁵ Compensation is just when all factors, taken into consideration, determine the sum to be paid, but this does not guarantee that precision as to the amount will be had. "He must be made whole but is not entitled to more."⁶⁶ "The question is what the owner has lost, not what has the taker gained," in computing the value,⁶⁷ and there is no "guaranty that a trial shall be devoid of error" in the computation; "the error must be gross and obvious, coming close to the boundary of arbitrary action." Some courts have said "the Constitution is not infringed unless there has been 'absolute disregard' of the right of the owner to be paid for what is taken. At other times we are told that . . . [constitutional requirements are] not lacking unless 'plain rights' have been ignored, with a reminder that much will be overlooked when there is nothing of unfairness or partiality in the course of the proceedings. . . . In the last resort the line of division is dependent upon differences of degree too subtle to be catalogued."⁶⁸ So, too, in one case the Supreme Court thought the award was far too high and yet affirmed;⁶⁹ in another it felt that a jury award of \$1.00 was not clearly unreasonable;⁷⁰ and in yet another there could be "no

80 S.Ct. 1134, 4 L.Ed.2d 1186; and see also *United States v. Virginia Electric & Power Co.* (1961) 365 U.S. 624, 81 S.Ct. 787, 5 L.Ed.2d 838.

63. *United States v. Cress* (1917) 243 U.S. 316, 37 S.Ct. 380, 61 L.Ed. 746, and *Sanguinetti v. United States* (1924) 264 U.S. 146, 44 S.Ct. 264, 68 L.Ed. 608, as well as *United States v. Virginia Electric & Power Co.*, supra note 62, citing these cases, although see *United States v. Chicago, Milwaukee & St. Paul R. R. Co.* (1941) 312 U.S. 592, 61 S.Ct. 772, 85 L.Ed. 1064, *United States v. Willow River Power Co.* (1945) 324 U.S. 499, 65 S.Ct. 761, 89 L.Ed. 1101, and *United States v. Dickinson* (1947) 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789.

64. *Portsmouth Harbor Land & Hotel Co. v. United States* (1922) 260 U.S. 327, 43 S.Ct. 135, 67 L.Ed. 287,

United States v. Causby (1946) 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206, and *Griggs v. County of Allegheny* (1962) 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed.2d 585.

65. Quoted in *United States v. Virginia Electric & Power Co.*, supra note 62 at p. 631.

66. *Ibid.*, at p. 633.

67. *Boston Chamber of Commerce v. Boston* (1910) 217 U.S. 189, 195, 30 S.Ct. 459, 54 L.Ed. 725.

68. *Roberts v. New York* (1935) 295 U.S. 264, 277-278, 55 S.Ct. 689, 79 L.Ed. 1429, cases omitted, per Cardozo.

69. *Ibid.*

70. *Chicago, Burlington & Quincy Rr. Co. v. Chicago* (1897) 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979.

evidence of a market in flowage easements of the type here involved," and so adopted a sort of balancing measurement.⁷¹

(3) At some stage of the proceeding there must be given an opportunity to be heard upon the amount of compensation, i. e., whether or not it is just,⁷² and this opportunity may be after its occupation by the authority.⁷³ In § 344 this aspect is developed further.

§ 337. — — Procedural—Unreasonable Searches and Seizures

The analysis of the 4th Amendment's prohibitions⁷⁴ suggests that its language initially be considered piecemeal. The amendment opens, "The right of the people to be secure⁷⁵ in their persons,⁷⁶ houses, papers, and effects," and questions arise concerning the meaning of these terms;⁷⁷ the amendment continues,

71. *United States v. Virginia Electric & Power Co.*, *supra* note 62 at p. 633.

72. *Bragg v. Weaver* (1919) 251 U.S. 57, 40 S.Ct. 62, 64 L.Ed. 135.

73. *Bailey v. Anderson* (1945) 326 U.S. 203, 66 S.Ct. 66, 90 L.Ed. 3.

74. Since only the government is prohibited the amendment does not apply to illegal acts by individuals having no connection with the government. *Burdeau v. McDowell* (1921) 256 U.S. 465, 475, 41 S.Ct. 574, 65 L.Ed. 1048, although see notes 85 to 88, *infra*.

75. If a lawful arrest has been made, and a contemporaneous search (see note 79) uncovers evidence of another crime, a conviction for the latter is upheld. *Harris v. United States* (1947) 331 U.S. 145, 153, 155, 67 S.Ct. 1098, 91 L.Ed. 1399 (a 5-4 decision). See also *United States v. Rabinowitz* (1950) 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653.

76. *Rochin v. California* (1952) 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183, illustrates the meaning of "person" literally and physically. There police officers broke into Rochin's home and saw him pick up and swallow two small capsules; they seized and handcuffed him, took him to a hospital, and there a stomach pump was used to recover the capsules; he was later indicted and convicted in the state court but, terming this "too close to the rack and the screw" and which "shocks

the conscience" and "offends 'a sense of justice,'" (pp. 172, 173) the Supreme Court reversed.

77. The language includes a business, auto, garage, but not the open fields. *Gouled v. United States* (1921) 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647; *Carroll v. United States* (1925) 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543; *Taylor v. United States* (1932) 286 U.S. 1, 52 S.Ct. 466, 76 L.Ed. 951; *Hester v. United States* (1924) 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898. Officers cannot break into a house, or even demand admission in the name of the law even though a person then admits them. *Johnson v. United States* (1948) 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436. A hotel room, entered into without a warrant during the absence of its occupant, is within the prohibition so that illegally seized items may not be held and used in evidence. *United States v. Jeffers* (1951) 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59.

In *People v. Friola* (1962) 11 N.Y.2d 157, 162, 182 N.E.2d 100, the dissenters wrote: "The officer who presented the offending evidence obtained it by a trespass. He had stationed himself on an upper landing of a fire escape outside defendant's apartment and heard conversations interpreted as connected with gambling activities. His presence was a violation of defendant's rights to privacy in his home and curtilage. Evidence seized by

"against unreasonable searches and seizures," and this not alone raises the question of the definition of unreasonable,⁷⁸ but impliedly permits a reasonable search and seizure;⁷⁹ adding "shall not be violated,"⁸⁰ the amendment then states, "and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation," which discloses that in order to obtain a warrant⁸¹ of arrest or seizure, the affiant must produce facts disclosing

means of a trespass is inadmissible under the Fourth Amendment." (Citations omitted.)

See also *In re Grand Jury Subpoena Duces Tecum*, etc. (S.D.N.Y.1961) 203 F.Supp. 575, 577-578 (citations omitted): "A subpoena duces tecum may be so sweeping that it violates the Fourth Amendment's prohibition of unreasonable searches. If a subpoena duces tecum does constitute a violation of the Fourth Amendment, the courts may quash or modify it. To avoid such judicial action, the subpoena must be reasonable. The courts have found that reasonableness, in this context, has three components. The subpoena duces tecum may command only the production of things relevant to the investigation being pursued. The subpoena must specify the things to be produced with reasonable particularity. The subpoena may order the production of records covering only a reasonable period of time."

78. Where entry into a room is "by subterfuge or fraud rather than force," the amendment applies, but it is not applicable "in the field of mechanical or electronic devices designed to overhear or intercept conversation, at least where access to the listening post was not obtained by illegal methods. On *Lee v. United States* (1952) 343 U.S. 747, 753, 72 S.Ct. 967, 96 L.Ed. 1270.

79. See, e. g., *Carroll v. United States*, supra note 77, at pp. 147-149. Also, a lawful arrest permits a simultaneous search. *Agnello v. United States* (1925) 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145. In *People v. Loria* (1961) 10 N.Y.2d 368, 373, 179 N.E.2d 478, the court said: "The Fourth Amendment, as noted, condemns only those searches and seizures which are unreasonable (citation). A search is reasonable if conducted pursuant to a legal

search warrant, by consent, or incident to a lawful arrest."

Mere suspicion is not sufficient for an arrest, but probable cause will suffice. *Mallory v. United States* (1957) 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479. Probable cause is "a belief, reasonably arising out of the circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction . . ." *Carroll v. United States* (1946) 267 U.S. 132, 147, 45 S.Ct. 280, 69 L.Ed. 543. Where no probable cause exists for an arrest, nothing occurring thereafter can make such an arrest lawful. *Rios v. United States* (1960) 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688.

80. There is no constitutional violation through the use of a dictaphone, *Goldman v. United States* (1942) 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322, or a wiretap, *Olmstead v. United States* (1928) 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944, although Congress may enact a statute, as it has done, upon this, and § 314 discloses the present status of the law upon this. See also note 78, supra, and 85, infra. Corporations and labor unions may not claim the protections of the 4th, or self-incrimination portions of the 5th, Amendments but may challenge the production order on grounds other than these. *Wilson v. United States* (1911) 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 771, *United States v. White* (1944) 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (even if individuals in charge of records plead self-incrimination).

81. The warrant may issue under any applicable federal statute. *Nathanson v. United States* (1933) 290 U.S. 41, 47, 54 S.Ct. 11, 78 L. Ed. 159.

probable cause; and, concluding, the final words are, "and particularly describing the place to be searched, and the persons or things to be seized," that is, no fishing expedition, and no general arrests or seizures. The amendment's prohibitions are of no great aid to a person who, upon a trial, is confronted by illegally-seized evidence, so that the 5th Amendment's prohibitions against self-incrimination (§ 340) must be considered also. "In this regard the Fourth and Fifth Amendments run almost into each other,"⁸² although "There is no room for applying the 5th Amendment unless the 4th Amendment was first violated."⁸³ In *Boyd v. United States*, decided in 1886, the Court held unconstitutional a statute which authorized judgment to be granted the government for sums claimed by it on account of revenue merely because the defendant failed to produce his books, papers, and invoices.

"Decisions of this court applying the principle of the *Boyd* Case have settled these things. Unjustified search and seizure violates the 4th Amendment, whatever the character of the paper, whether the paper when taken by the federal officers was in the home, in an office, or elsewhere; whether the taking was effected by force, by fraud, or in the orderly process of a court's procedure. From these decisions, it follows necessarily that the Amendment is violated by the officer reading the paper without a physical seizure, without his even touching it; and that use, in any criminal proceeding, of the contents of the paper so examined—as where they are testified to by a federal officer, who thus saw the document, or where, through knowledge so obtained, a copy has been procured elsewhere—any such use constitutes a violation of the 5th Amendment."⁸⁴

82. *Boyd v. United States* (1886) 116 U.S. 616, 630, 6 S.Ct. 524, 29 L.Ed. 746.

83. *Olmstead v. United States*, *supra* note 80, at p. 462, per Chief Justice Taft.

84. *Ibid.*, pp. 477-478. In this decision wire-tapping was upheld constitutionally, see note 80 and reference to § 314, against dissents by Holmes, Brandeis, Butler, and Stone; at p. 470 Holmes called the government's part in illegal seizures "ignoble," and thought it was "dirty business."

In *People v. O'Neill* (1962) 11 N.Y.2d 148, 153, 182 N.E.2d 95, the court said (citations omitted): "The search cannot be justified as incident to a lawful arrest, for it was commenced several hours before

defendant, who was at all times present, was arrested. As we stated . . . a search "is good or bad when it starts and does not change character from its success". When Schuchman and Kenny left defendant's home and obtained a warrant for her arrest it was too late to validate the prior unlawful search. Moreover, the arrest warrant, according to Schuchman's testimony, was based in part upon pictures seized during the initial unlawful search, and found in the room with 'a lot of stuff.' Thus he testified that they 'went before Judge Pantano and had a warrant issued charging possession of the pictures and the mailing in Lynbrook of the nude pictures . . .'. The subsequent arrest, based as it was, in

If the combined prohibitions of the 4th and 5th (self-incrimination portion) Amendments are effective as against government officials, then the following possibilities occur:

- 1) Federal officials illegally obtain the evidence and desire to use it
 - a) In a federal court
 - b) Give it "free" to state officials to use in a state court (silver platter doctrine)
 - c) In a state court
- 2) State officials illegally obtain the evidence and desire to use it
 - d) In a federal court
 - e) Give it "free" to federal officials to use in a federal court (silver platter doctrine)
 - f) In a state court
- 3) Private persons illegally obtain the evidence and desire to use it
 - g) In a federal court
 - h) Give it free to either state or federal officials to use in a state or federal court
 - i) In a state court

The first six have been negated, and held directly prohibited by the two Amendments or indirectly through the 14th Amendment,⁸⁵ and (h) follows these principles. As for (g) and (i), the

part, upon an illegal seizure, cannot be the basis of a search incident to lawful arrest; the arrest 'must be validated without any resort to the fruits of the search'. 'If, therefore, it is necessary to rely on the search to justify the arrest, the conclusion is inescapable that a search that cannot be justified by what it turns up cannot justify the arrest.' And at p. 153-154: "Moreover, the officers may not testify to what they observed during the illegal search."

85. *Mapp v. Ohio* (1961) 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081. In *People v. Dinan* (1962) 11 N.Y.2d 350, 183 N.E.2d 689 (decided May 17, 1962) the New York Court of Appeals rejected a contention that the *Mapp* case now forbade the introduction of wiretap evidence into a state court. The 4-3 decision proceeded upon the basis of wiretaps being statutorily, not constitutionally, forbidden, and that

under the *Olmstead-Schwartz-Benanti* line of cases it was up to each state jurisdiction to determine for itself its own evidentiary policy. The majority felt that "For reasons of high governmental policy, the exclusionary rule has been deemed in *Mapp* to be binding on the State to aid in the enforcement of the fundamental law. *Pugach* indicates that the same sanction may not be applied to the enforcement of a Federal statute or rule. Unless and until the Supreme Court decides otherwise we shall follow our prior decisions" (citations omitted) The dissent felt that "we should forthrightly hold" to bar the use of wiretap evidence in the state court. Cert. den. — U.S. —, — S.Ct. —, — L.Ed.2d — (Oct. 22, 1962).

On wiretapping, see also note 80, *supra*, and also § 314, note 19, § 337,

persons are civilly and criminally responsible, of course, for their illegal acts,³⁶ but what occurs when the evidence is nevertheless sought to be used in a civil matter by these or other persons, whether or not conspirators? Since it is a rule of evidence only which is involved, all federal and state jurisdictions may theoretically now determine for themselves what to do as there is no constitutional inhibition against use, as distinguished from seizure, for neither the 4th nor the 5th nor the 14th applies to private action.³⁷ And even the entirety of the 4th Amendment, standing

note 80, and § 426. And see further § 424, note 57, bringing up the question whether a state's own evidentiary and other rules must now additionally incorporate the federal concept of what is "reasonable" or "unreasonable."

86. See, e. g., *Wolf v. Colorado* (1949) 338 U.S. 25, 30, fn. 1, 31, fn. 2, 69 S.Ct. 1359, 93 L.Ed. 1782, stating that sanctions against illegal state police officers included civil suits, and criminal or administrative proceedings. The *Wolf* case has been overruled, as to its holding, by the *Mapp* case, *supra* note 85, but suits for civil damages are still available under 42 U.S.C.A. § 1983; the district court has jurisdiction in such a suit under 28 U.S.C.A. §§ 1331(a) and 1343 (3). *Monroe v. Pape* (1961) 365 U.S. 167, 169, 81 S.Ct. 473, 5 L.Ed.2d 429.

87. In *Chambers v. Rosetti* (City Ct. 1962) — Misc.2d —, 226 N.Y.S.2d 27, 28, a replevin action against the city property clerk to recover \$4,534.47 seized following plaintiff's arrest on a policy charge, subsequently dismissed by the lower criminal court, plaintiff moved to preclude defendant upon the trial from offering evidence or testimony incidental to the alleged illegal search and seizure, and for summary judgment, citing *Mapp*, *supra* note 85. The court held that the decision in *Mapp* "is not limited to criminal cases but its holding applies to this court, and specifically on this motion, and that testimony and evidence of an illegal search and seizure thereunder must be precluded in this court." It should be noted that this case was based upon original police (state) action, that the civil action in effect was a continuation or co-

rollary of the criminal case, and that the plaintiff was seeking the actual property itself, not relief which required proof through such property and its use as evidence. The principles in *Mapp* are sufficient to permit evidentiary rules in civil cases to be formulated so as to preclude use of such evidence; it is suggested these be so formulated.

In *Sackler v. Sackler* (1962) 16 A.D. 2d 423, 229 N.Y.S.2d 61, a New York intermediate court had before it a divorce action in which the husband and others (none of them being police officers or connected with the city or state) entered the wife's apartment without her consent and without any search warrant, and obtained evidence of her adultery. By a bare majority (3-2) the appellate court permitted the evidence in. The reasoning was that the constitutional prohibition "is not intended to be a limitation upon other than governmental agencies." *Burdeau v. McDowell* (1921) 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048, was cited in support of the proposition that private individuals are not so bound and their illegally-garnered evidence is admissible, the majority adding that this case "has never been overruled." The two dissenters, in separate opinions, felt that no distinction between criminal and civil cases should be made, and that "the spirit" of the *Mapp* decision prevented the use here of the illegally obtained evidence. It is submitted that the *Burdeau* case is not law today, and that the string of decisions thereafter narrowing the availability of illegal evidence in criminal cases discloses that the Brandeis-Holmes views fit likewise into the civil picture. Further, the consequenc-

apart from the self-incrimination portion of the 5th, apparently does not *per se* apply to the states, although (a portion of) its concepts may be utilized.⁸⁸

A warrant of seizure or arrest must be obtained whenever there is sufficient time, and the warrant must be, as the language of the 4th Amendment puts it, "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."⁸⁹ This re-

es attendant upon civil acceptance of such evidence do involve the government via the judiciary, and in this respect *Shelley v. Kraemer* and *Barrows v. Jackson*, both in § 460, notes 107 and 108 respectively, disclose that due process hits state action even when the judiciary adjudicates private suits. Finally, the impetus such an "admission" would give to private action dehors government sanction would likewise reduce our national respect for the law, and other logical consequences need not be explored.

88. *Marcus v. Search Warrants of Property* (1961) 367 U.S. 717, 81 S. Ct. 1708, 6 L.Ed.2d 1127, although Black, with Douglas concurring, feels that the majority should go whole hog and declare the entirety of the 4th, through the 14th, a limitation upon states. In *Monroe v. Pape*, supra note 86, Justice Douglas' majority opinion, as well as the concurring and partly dissenting opinions, went into extended discussions of the historical aspects of the Civil Rights Cases and, while the former's view was that the "guarantee against unreasonable searches and seizures contained in the Fourth Amendment has been made applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment," this was not required for the holding and the later *Marcus* and *Mapp* cases did not go so far. (*Mapp* case, supra note 85.)

The reason for this last statement is that in the *Mapp* case the majority opinion was that of but three Justices, all of whom apparently desired to use the 4th Amendment alone. However, there were three dissenting Justices, and these did not desire to overrule the *Wolf* case. The remaining three were

divided as follows: Black definitely stated that he was "still not persuaded that the Fourth Amendment, standing alone, would be enough to bar the introduction into evidence" of the unlawfully seized papers; Stewart agreed fully with the dissenting opinion's Part I and did not "express [any] view as to the merits of the constitutional issue;" and Douglas' concurring opinion did not say anything about this. Thus at least four Justices were definitely against this view of the sufficiency of the 4th alone, and one may have agreed with this; three were in favor, with one probably agreeing.

89. In *Brinegar v. United States* (1949) 338 U.S. 160, 175-176, 69 S. Ct. 1302, 93 L.Ed. 1879, the court said (citations omitted): "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.

"The substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.' And this 'means less than evidence which would justify condemnation' or conviction Since Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge, and of which they had reasonably trustworthy information, [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed.

quires facts to be set forth, of such a nature that a reasonably discreet and prudent person would conclude the offense charged had been committed,⁹⁰ and in 1961 this requirement, at least, of the 4th Amendment was, in effect, made applicable to the states through the 14th Amendment.⁹¹

"These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. . . ."

90. *Steele v. United States* (1925) 267 U.S. 498, 504-505, 45 S.Ct. 414, 69 L.Ed. 757. In *Monnette v. United States* (5th Cir. 1962) 299 F.2d 847, 849, fn. 3, an affidavit of a state agent is set forth which was held sufficient to justify the issuance of a search warrant by a United States Commissioner: "I am an enforcement agent with the Florida State Beverage Department. On February 20, 1960, I received information that an unregistered distillery was being concealed and operated on the premises at 16200 Northwest 39th Place, Miami, Dade County, Florida. At about 5:30 P. M. on February 22, 1960, I observed a 1960 Plymouth bearing a 1960 Florida Tag #1-137576 on the above premises. This Plymouth was known to me to be used by Robert Noreng, a known liquor law violator, for the distribution of illicit liquor in the Dade County area. At about 8:00 P. M. on February 23, 1960, while making an investigation and observation of the above described premises I distinctly smelled the odor of fermenting mash emanating from these premises."

For another affidavit, see *Jones v. United States* (1960) 362 U.S. 257, 267, fn. 2, 80 S.Ct. 725, 4 L.Ed.2d 697, in which the entire court, save Douglas who dissented, felt that the particular affidavit which, it was charged, "rested wholly on hearsay," was sufficient. At p. 269 the court stated: "We held in *Nathanson v. United States* [1933] 290 U.S. 41, [54 S.Ct. 11, 78 L.Ed. 159]

that an affidavit does not establish probable cause which merely states the affiant's belief that there is cause to search, without stating facts upon which that belief is based. A fortiori this is true of an affidavit which states only the belief of one not the affiant. This is not, however, this case. The question here is whether an affidavit which sets out personal observations relating to the existence of cause to search is to be deemed insufficient by virtue of the fact that it sets out not the affiant's observations but those of another." The answer was no, "so long as a substantial basis for crediting the hearsay is presented."

91. The *Marcus* case, *supra*, note 88, holding bad an affidavit which stated that "of his own knowledge," i. e., the affiant's, the defendant "at its stated place of business 'kept for the purpose of [sale] * * * obscene * * * publications * * *.'" No copy of any magazine was filed with the complaint or shown to the [state] circuit judge." Based upon this a general warrant to "seize * * * [obscene materials] and take same into your possession" was issued. At p. 1711 of 81 S.Ct. See also Justice Jackson's dissent in the *Brinegar* case, *supra* note 89, at p. 180, protesting against "Indications [which] are not wanting that Fourth Amendment freedoms are tacitly marked as secondary rights, to be relegated to a deferred position. . . . These, I protest, are not mere second-class rights, but belong in the catalog of indispensable freedoms." Justices Frankfurter and Murphy joined in this opinion.

In general, for an excellent discussion of the cases and statutes, see *Cohen v. Norris* (9th Cir. 1962) 300 F.2d 24.

§ 338. — — — Criminal Indictment or Presentment

The 5th Amendment's opening clause states that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury," excepting therefrom the armed forces and martial law. A "capital" crime is self-explanatory, but what does "infamous" mean? "What punishment shall be considered as infamous may be affected by changes of public opinion from one age to another."⁹² However, imprisonment within a penitentiary, whether with or without hard labor, is infamous, and where the imprisonment is "in any other place than a penitentiary, and was to be at hard labor, the latter gave it character; that is, made it infamous"⁹³ Deportation of an alien by administrative order is not subject to the amendment, but when the order adds imprisonment at hard labor before the deportation, then the defendant's constitutional rights are violated where there is no presentment or indictment.⁹⁴ A presentment or indictment is by a grand jury, but an information is not. Thus when the crime is a capital or infamous one, and the defendant is proceeded against by information, the amendment's prohibitions apply and the complaint must be dismissed.⁹⁵

§ 339. — — — Double Jeopardy

The second clause in the 5th Amendment states that "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." This prohibition is not confined to being put in jeopardy in a second and independent case, but extends also to the same case where a new trial is granted upon the government's motion and not upon that of the defendant.⁹⁶ Where a defendant is acquitted because the statute of limitations is a bar, or on a general verdict to an indictment not challenged as insuf-

92. *Ex parte Wilson* (1885) 114 U.S. 417, 427, 55 S.Ct. 935, 29 L.Ed. 89.

93. *United States v. Moreland* (1922) 258 U.S. 433, 437, 42 S.Ct. 368, 66 L.Ed. 700; see also p. 443, where the dissenters agree as to the penitentiary imprisonment being infamous.

94. *Wong Wing v. United States* (1896) 163 U.S. 228, 16 S.Ct. 977, 41 L.Ed. 140. Counterfeiting, fraudulent alteration of poll books or voting, embezzlement, etc., are also classed as infamous crimes. *Ex parte Wilson*, supra note 92;

Mackin v. United States (1886) 117 U.S. 348, 6 S.Ct. 777, 29 L.Ed. 909; *Parkinson v. United States* (1887) 121 U.S. 281, 7 S.Ct. 896, 30 L.Ed. 959; *United States v. DeWalt* (1888) 128 U.S. 393, 9 S.Ct. 111, 32 L.Ed. 485.

95. The *Moreland* case, supra note 93. Brandeis dissented, with Taft and Holmes concurring in his opinion.

96. *Kepner v. United States* (1904) 195 U.S. 100, 24 S.Ct. 797, 49 L.Ed. 114, decided by a bare majority.

ficient, there can be no subsequent prosecution, but a defendant's discharge because the jury cannot agree, or because of a juror's disqualification, is no bar.⁹⁷ Double jeopardy generally requires that the same offense be involved, and the test is whether the same evidence is involved in, and required to sustain, both cases.⁹⁸ In a 1957 case the Supreme Court found double jeopardy where a defendant was tried for a crime divided into degrees and was convicted of a degree lesser than that charged in the indictment. This raised the question whether there was an implied acquittal of the higher degree so that a retrial could not be had on that higher degree. The Supreme Court answered yes, although some states answered to the contrary, and wrote: "The vital thing is that it is a distinct and different offense," and that by remaining silent "the jury's verdict [is] an implicit acquittal on the charge of first degree murder."⁹⁹ And in a 1959 case the Court, in a six to three division, held the plea did not lie to a federal prosecution on charges growing out of identical facts for which a state had indicted the defendants, to which they had pleaded guilty and been sentenced.¹⁰⁰

97. *United States v. Oppenheimer* (1916) 242 U.S. 85, 37 S.Ct. 68, 61 L.Ed. 161; *United States v. Ball* (1896) 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300; *United States v. Perez* (1824) 9 Wheat. 579, 6 L.Ed. 165; *Simmons v. United States* (1891) 142 U.S. 148, 12 S.Ct. 171, 35 L.Ed. 968.

98. *Burton v. United States* (1906) 202 U.S. 344, 26 S.Ct. 688, 50 L.Ed. 1057; *Morgan v. Devine* (1915) 237 U.S. 632, 35 S.Ct. 712, 59 L.Ed. 1153. Where distinct offenses make up a completed transaction, and Congress has power to punish for the latter, it may also punish separately each step leading to it. *Albrecht v. United States* (1927) 273 U.S. 1, 47 S.Ct. 250, 71 L.Ed. 505.

The question of the presentation of evidence may be illustrated in three situations: (1) a jury is not impaneled so that no evidence is presented, and a new trial, for example, is granted at this point; upon a second trial no plea of double jeopardy is available; (2) a jury is empaneled and sworn, and substantial vital evidence is offered; this prevents any second trial; (3) but suppose a jury is empaneled and sworn, but no evidence is offered or heard? This last situ-

ation was presented in *Downum v. United States* (5th Cir. 1962) 300 F.2d 137, and it was held that in this case the trial court "did not abuse its sound discretion in discharging the first jury." P. 141.

The second above situation occurred in *Fong Foo v. United States* (1962) 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed. 2d 629, where three government witnesses had testified, and while a fourth was upon the stand the district judge directed the jury to return verdicts of acquittal as to all defendants and a formal judgment of acquittal was subsequently entered as to each defendant; thereafter the Court of Appeals granted a petition for mandamus vacating the judgment of acquittal and reassigning the case for trial. The Supreme Court reversed, the reason being that a judgment of acquittal had been entered and the trial had finally terminated, so that double jeopardy would now result upon a second trial.

99. *Green v. United States* (1957) 355 U.S. 184, 194, fn. 14, 190, 78 S.Ct. 221, 2 L.Ed.2d 199.

100. *Abbate v. United States* (1959) 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed. 2d 729. The state indictment was

§ 340. — — — Self-Incrimination

The third clause of the 5th Amendment states that no person "shall be compelled in any criminal case to be a witness against himself." This has been somewhat discussed in § 159, and in § 337 in connection with the 4th Amendment's prohibitions against unreasonable searches and seizures, so that we here add to that. There is a difference in approach between the self-incrimination safeguards found in the 5th Amendment and which are binding upon the federal courts, and those found in the 14th Amendment's Due Process Clause Procedural which are binding upon the state courts; for in the latter the Supreme Court's power "is limited to the enforcement of those 'fundamental principles of liberty and justice' which are secured by the Fourteenth Amendment, [while in the former] the scope of our reviewing power over convictions brought here from the Federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence."¹⁰¹

Since the clause speaks of a "criminal case," it apparently does not refer to a civil proceeding, but it has been accorded a liberal interpretation to mean a personal right, to be explicitly claimed, in any type of proceeding whatsoever, in which the party's or witness' answer may be used against him in a later criminal proceeding, although not where the statute of limitations or a full pardon bars this consequence, or where the refusal is based upon the fear of a later state prosecution, or where confession is freely and voluntarily made without compulsion.¹⁰²

conspiracy to injure or destroy the property of another, and the sentences were three months; the federal crime was a conspiracy to destroy property and parts of a federally controlled and operated system of communications. In *Bartkus v. Illinois* (1959) 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684, decided simultaneously, the convictions were reversed, that is, a first federal, and a second state, prosecution, although here the first ended in an acquittal; the Supreme Court's majority held no double jeopardy because the 5th Amendment's double jeopardy clause was not applicable to the states, and that there was no due process violation.

¹⁰¹. *McNabb v. United States* (1943) 318 U.S. 332, 340, 63 S.Ct. 608, 87 L.Ed. 819, per Frankfurter; see

also note 102, *infra*. Concerning wiretapping, see § 314, note 19, and § 337, notes 78, 80, 85. On evidence and presumptions, see § 422.

¹⁰². *Counselman v. Hitchcock* (1892) 142 U.S. 547, 562, 12 S.Ct. 195, 35 L.Ed. 1110; *Rogers v. United States* (1951) 340 U.S. 367, 371, 370 respectively, 71 S.Ct. 438, 95 L.Ed. 344; *McCarthy v. Arndstein* (1924) 266 U.S. 34, 40, 45 S.Ct. 16, 69 L.Ed. 158; *Brown v. Walker* (1896) 161 U.S. 591, 598-599, 16 S.Ct. 644, 40 L.Ed. 819, although not where a Presidential tender of a pardon is rejected, *Burdick v. United States* (1915) 236 U.S. 79, 35 S.Ct. 267, 59 L.Ed. 476; *United States v. Murdock* (1931) 284 U.S. 141, 149, 52 S.Ct. 63, 76 L.Ed. 210, and state testimony under an immunity statute may also be admitted in a federal prosecution, *Feldman v. United*

"The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, and to require him to answer if 'it clearly appears to the court that he is mistaken.' However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.' " ¹⁰³

States (1944) 322 U.S. 487, 64 S.Ct. 1082, 88 L.Ed. 1408, though not federal testimony under a federal immunity statute in a state court, *Adams v. Maryland* (1954) 347 U.S. 179, 74 S.Ct. 442, 98 L.Ed. 608; *Pierce v. United States* (1896) 160 U.S. 355, 16 S.Ct. 321, 40 L.Ed. 454, although not where defendants were arrested for murder, questioned for parts of three days, without counsel, and then made statements used against them, *McNabb v. United States*, *supra* note 101, at p. 340, reaffirmed in *Malloy v. United States* (1957) 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (but because of a federal criminal rule), in the *McNabb* case *Frankfurter* writing: "And this Court has, on Constitutional grounds, set aside convictions, both in the Federal and state courts, which were based upon confessions 'secured by protracted and repeated questioning of ignorant and untutored persons, in whose minds the power of officers was greatly magnified,' or 'who have

been unlawfully held incommunicado without advice of friends or counsel.' " (Citations omitted.)

103. *Hoffman v. United States* (1951) 341 U.S. 479, 486-487, 71 S.Ct. 814, 95 L.Ed. 1118, reversing a conviction. In *Rogers v. United States* (1951) 340 U.S. 367, 71 S.Ct. 438, 95 L.Ed. 344, the claim of privilege "was pure afterthought," and so was disallowed, and in *Kimm v. Rosenberg* (1960) 363 U.S. 405, 80 S.Ct. 1139, 4 L.Ed.2d 1299, an alien's application for suspension of a deportation order was denied, the alien having refused to answer a question on Communist Party membership, and not sustaining his statutory burden of proof in this discretionary proceeding. See also *Blau v. United States* (1950) 340 U.S. 159, 161, 71 S.Ct. 223, 95 L.Ed. 170, questions on Communist affiliation not required to be answered, although when immunity is granted the privilege is not available, *Ullman v. United States* (1956) 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511,

We have discussed somewhat Congress' investigating powers, and the rights of witnesses to refuse to answer, in §§ 151-159, and in § 425 we discuss the analogous powers of a state; in § 329 we mentioned these questions from the 1st Amendment point of view, and in § 314 we saw that any federal-state conflict in, say, the field of subversive activity, is resolved in favor of federal supremacy and, where required, preemption. Here we touch again, but slightly, upon these subjects. Loyalty and security investigations by legislative committees have posed constitutional and statutory problems, for witnesses may and do use the self-incrimination clause.¹⁰⁴ The test applied to a witness' refusal to answer is the "real danger v. imaginary possibility" one, and this is the standard which the decisions use, i. e., "the danger to be apprehended [and to the witness] must be real and appreciable, [not imaginary and insubstantial] We think that a merely remote and naked possibility, out of the ordinary course of law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice." But Justice Harlan felt that "in recent per curiam reversals of contempt convictions this Court seems to have indicated a tendency to stray from the application of this traditional standard."¹⁰⁵ A witness may, of course, waive the privilege by failing to invoke it at the time, or properly, and cannot assert it on behalf of others.¹⁰⁶ Records which are statutorily required to be kept cannot be withheld,¹⁰⁷ and neither a corporation nor a member of a labor union who is in charge of its records may claim the privilege.¹⁰⁸ However, a corporation may seek the

and *Orloff v. Willoughby* (1953) 345 U.S. 83, 73 S.Ct. 534, 97 L.Ed. 842, army commission refused where privilege claimed.

104. The privilege may be claimed in layman's language, so long as it is a reasonably clear assertion. *Emspak v. United States* (1955) 349 U.S. 190, 75 S.Ct. 687, 99 L.Ed. 997. On the indictment aspect, see § 159, note 39. In *Hutcheson v. U. S.* (1962) 369 U.S. 599, 82 S.Ct. 1005, 8 L.Ed.2d 137, 3 Justices felt the possible use in a state trial of the testimony was insufficient (no 5th plea was made); 1 Justice concurred in result but felt this claim was precluded; 2 Justices dissented; 3 Justices did not participate. The issue is therefore still open.

105. *Ibid.*, at p. 206, quotation at p. 205 from an English case.

106. *Rogers v. United States* (1951) 340 U.S. 367, 71 S.Ct. 438, 95 L.Ed. 344, *Smith v. United States* (1949) 337 U.S. 137, 69 S.Ct. 1000, 93 L. Ed. 1264 (if general claim of privilege made, waiver must be clearly proven); *Brown v. United States* (1958) 356 U.S. 148, 78 S.Ct. 622, 2 L.Ed.2d 589.

107. *Shapiro v. United States* (1948) 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed. 1787.

108. *Hale v. Henkel* (1906) 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652, and cf. *United States v. Bausch & Lomb Optical Co.* (1944) 321 U.S. 707, 64 S.Ct. 805, 88 L.Ed. 1024, with *Boyd v. United States*, *supra* note 82; *United States v. White* (1914) 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542.

4th Amendment's protection against the use of records unreasonably seized.¹⁰⁹

The 1st Amendment's freedoms are also claimed by recusant witnesses as a justification; in general, albeit with contrary views and sometimes dissents by Chief Justice Warren and Justices Black and Douglas, the majority refuses to uphold these claims. The argument is also made, as for example by Justice Brennan in the *Barenblatt* case, that an investigation has no purpose except exposure of a witness purely for the sake of exposure; where so disclosed, this is a valid contention.¹¹⁰ For a variety of reasons, including executive non-authorization of arbitrary action, a violation of the 5th Amendment's requirements of notice and hearing, and a general condemnation of lack of hearing, the court denounced the listing of an organization as allegedly subversive by the Attorney General.¹¹¹

The right of confrontation in criminal proceedings, found in the 6th Amendment (§ 341, note 116), does not apply to proceedings not so characterized, but a procedural violation under the 5th Amendment may occur.¹¹² The issue was raised most sharply in the loyalty cases, and although avoiding the question whether a governmental employee was entitled to this right by holding that the President's Executive Order did not authorize the particular procedure used in the dismissal, Justice Douglas' concurrence inveighed against these "faceless informers" and stated that "Confrontation and cross-examination under oath are essential, if the American ideal of due process is to remain a vital force in our public life."¹¹³ The same technical approach was taken in voiding a security dismissal of an employee of a governmental contractor.¹¹⁴ Where a department does not follow its own procedures in a loyalty proceeding, a dismissal is invalid.¹¹⁵

109. *Silverthorne Lumber Co. v. United States* (1920) 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319.

110. *Barenblatt v. United States* (1959) 360 U.S. 109, 79 S.Ct. 1081, 3 L.Ed.2d 1115.

111. *Joint Anti-Fascist Refugee Committee v. McGrath* (1951) 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817.

112. Suspension of deportation proceedings are not so covered, *Jay v. Boyd* (1956) 351 U.S. 345, 76 S.Ct. 919, 100 L.Ed. 1242.

113. *Peters v. Hobby* (1955) 349 U.S. 331, 351, 75 S.Ct. 790, 99 L.Ed. 1129. See also *Bailey v. Richardson* (1950) 86 U.S.App.D.C. 248, 182 F.2d 46, *affd. eq. divided ct.* (1951) 341 U.S. 918, 71 S.Ct. 669, 95 L.Ed.

1352, *Cole v. Young* (1956) 351 U.S. 536, 76 S.Ct. 861, 100 L.Ed. 1396.

114. *Greene v. McElroy* (1959) 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377.

115. *Service v. Dulles* (1957) 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403, *Vitarelli v. Seaton* (1959) 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed.2d 1012.

On the revised order of the A. E. C., promulgated in April, 1962, permitting confrontation where its employees and job applicants are involved in security proceedings, see § 188, note 65. This pioneering approach may signal a general acceptance of this standard of fairness in these proceedings.

§ 341. — — — Assistance of Counsel

The 6th Amendment's clauses are somewhat self-explanatory, and for our purposes only the last clause need be examined, namely, "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."¹¹⁶ A deportation proceeding is not criminal in character and therefore not within the clause, but its prohibitions apply to situations where counsel for a defendant is required, over his client's objections, to represent a co-defendant with a possible conflict of interest involved, or the converse involving required representation of a defendant, who was not present, by a lawyer representing another defendant;

116. One of the clauses in this amendment has to do with an "impartial jury;" government employees, as a class, are not disqualified by an implied bias against a defendant in a narcotics case, or against a recusant Communist Party official in a congressional committee investigation, although actual proof of bias, if shown, would disclose a violation. *United States v. Wood* (1936) 229 U.S. 123, 57 S.Ct. 177, 81 L.Ed. 78; *Frazier v. United States* (1948) 335 U.S. 497, 69 S.Ct. 201, 93 L.Ed. 187; *Dennis v. United States* (1950) 339 U.S. 162, 80 S.Ct. 519, 94 L.Ed. 734.

On the meaning of trial by jury, see *Patton v. United States* (1930) 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854. Where the accused is intelligent and competent he may, with the approval of the court, waive a jury trial even though without the advice of counsel. *Adams v. United States* (1943) 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268.

Art. III, cl. 3, provides that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . ." On this, see, e. g., *District of Columbia v. Colts* (1930) 282 U.S. 63, 51 S.Ct. 52, 75 L.Ed. 177; *District of Columbia v. Clawans* (1937) 300 U.S. 617, 57 S.Ct. 660, 81 L.Ed. 843. See also § 429 on additional aspects of the 6th Amendment. Incorporated territories have this right. *Dorr v. United States* (1904) 195 U.S. 138, 24 S.Ct. 808, 49 L.Ed. 128.

The right of confrontation is guaranteed by this 6th Amendment, but evidentiary exceptions may be made, e. g., dying declarations,

Mattox v. United States (1895) 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409. The right is not necessarily applicable to proceedings other than criminal, e. g., selective service, *United States v. Nugent* (1953) 346 U.S. 1, 73 S.Ct. 991, 97 L.Ed. 1417. See, for additional discussion, § 340.

The concurring opinion of Justice Brennan, in *Palermo v. United States* (1959) 360 U.S. 343, 362-363, 79 S.Ct. 1217, 3 L.Ed.2d 1287, raises the question whether the requirement of compulsory process for witnesses may not be violated by a statute which restrains a trial judge from ordering the government to produce a memorandum summarizing a witness' pre-trial statements. This goes back to *Jencks v. United States* (1957) 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103, thereafter codified in 71 Stat. 595, 18 U.S.C.A. § 3500, setting forth the procedures whereby statements of a witness given to the government are to be produced on defendant's demand after the witness has testified, although the court may first screen the documents; failure to so produce results in a striking of the testimony and a possible mistrial. In *Rosenberg v. United States* (1959) 360 U.S. 367, 79 S.Ct. 1231, 3 L.Ed.2d 1304, the failure to order production was there held to be harmless error. See also *Campbell v. U. S.* (1961) 365 U.S. 85, 81 S.Ct. 421, 5 L.Ed.2d 428.

On the right to speedy arraignment, although here the Federal Rules of Criminal Procedure 5(a) applies, see *Mallory v. United States* (1957) 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed. 2d 1479.

and a sentence is invalid where a plea of guilty is obtained by the prosecution's deception or coercion, or upon erroneous advice of a government attorney, where defendant had no counsel and had not understandingly waived such right.¹¹⁷

An accused has an absolute right to his own deliberate choice of counsel, regardless of the competency or effectiveness of the latter,¹¹⁸ but the question is whether an indigent defendant is entitled as a matter of constitutional right to the assistance of effective counsel, at all stages of the federal criminal court proceeding,¹¹⁹ to be supplied by the government.¹²⁰ The Supreme Court upholds this right "in all criminal prosecutions in the federal courts,"¹²¹ especially "where the accused was ignorant and uneducated, was kept under close surveillance, and was the object of widespread public hostility," and counsel's assistance "is of no less moment to an accused who must decide whether to plead guilty than to an accused who stands trial."¹²²

§ 342. — — — Civil Jury Trials

The 7th Amendment provides that a jury trial is a federal litigant's right in a civil common law suit involving more than

117. *United States ex rel. Bilokumsky v. Tod* (1923) 263 U.S. 149, 44 S.Ct. 54, 68 L.Ed. 221; *Glasser v. United States* (1942) 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680; *United States v. Hayman* (1952) 342 U.S. 205, 72 S.Ct. 263, 96 L.Ed. 232; *Walker v. Johnston* (1941) 312 U.S. 275, 61 S.Ct. 574, 85 L.Ed. 830; *Von Moltke v. Gillies* (1948) 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309.

118. *Foster v. Illinois* (1947) 332 U.S. 134, 67 S.Ct. 1716, 91 L.Ed. 1955. F. B. I. wiretapping of phone conversations between a defendant and attorney is a violation. *Coplon v. United States* (1951) 89 U.S. App.D.C. 103, 191 F.2d 749, cert. den. (1952) 342 U.S. 926, 72 S.Ct. 363, 96 L.Ed. 690.

119. Apparently, however, not before the indictment, *Gilmore v. United States* (10th Cir. 1942) 129 F.2d 199, cert. den. (1942) 317 U.S. 631, 63 S.Ct. 52, 87 L.Ed. 509; *Setser v. Welch* (4th Cir. 1947) 159 F.2d 703, cert. den. (1947) 331 U.S. 840, 67 S.Ct. 1510, 91 L.Ed. 1851.

120. See, e. g., *Johnson v. Zerbst* (1938) 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, and the *Walker*, *Von Moltke*, and *Glasser* cases, *supra* note 106.

121. See the *Foster* case, *supra* note 118, at pp. 136-137: "By virtue of that provision counsel must be furnished to an indigent defendant prosecuted in a federal court in every case, whatever the circumstances." For this right in the state criminal courts, see § 429.

122. *Von Moltke v. Gillies*, *supra* note 117, at pp. 720, 721. At p. 722 the four (majority) Justices also said: "It is the solemn duty of a federal judge before whom a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right at every stage of the proceedings. This duty cannot be discharged as though it were a mere procedural formality. In *Powell v. Alabama* . . . the trial court, instead of appointing counsel particularly charged with the specific duty of representing the defendants, appointed the entire local bar. This Court treated such a cavalier designation of counsel as a mere gesture, and declined to recognize it as a compliance with the constitutional mandate relied on in that case." (Citations omitted.)

twenty dollars.¹²³ Despite this apparently mandatory right, civil cases of not too large an amount may be constitutionally tried by a judge provided that upon an appeal a jury trial under the amendment may be had.¹²⁴ And where a plaintiff does not produce sufficient evidence to justify submission of the cause to a jury, the judge may grant such a motion or reserve his decision and await the jury's verdict; and after a jury's verdict the judge, under certain circumstances, may grant a motion to set aside the verdict and any judgment and grant a motion for a judgment notwithstanding the verdict; and if such a motion of defendants is denied the Court of Appeals has power, on appeal, to grant it.¹²⁵

§ 343. — — — Excessive Bail, Fines, Cruel and Unusual Punishment

The 8th Amendment denounces each of the above three items, but their general nature requires some degree of elaboration. Thus bail was fixed in a Smith Act (conspiring to teach or advocate the overthrow of the government by force or violence) indictment of \$50,000, but the Supreme Court reversed, holding "the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as an additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment." But here, where the maximum fine was \$5,000, "there has been no factual showing [by the government] to justify such action in this case."¹²⁶ However, under the provisions of the Internal Security Act (permitting deporta-

123. The amendment is not a limitation upon the states and does not apply to admiralty or equitable cases, or to a statutory proceeding unknown at the common law. *Waring v. Clarke* (1847) 5 How. 460, 12 L.Ed. 226, N. L. R. B. v. *Jones & Laughlin Steel Corp.* (1937) 301 U. S. 1, 57 S.Ct. 615, 81 L.Ed. 893.

124. *Capital Traction Co. v. Hof* (1899) 174 U.S. 1, 13-14, 19 S.Ct. 580, 43 L.Ed. 873, discussing also the type and nature of the jury required. See also *Maxwell v. Dow* (1900) 176 U.S. 581, 586, 20 S.Ct. 448, 494, 44 L.Ed. 597.

125. Fed. Rules of Civ. Proc. rule 50 (b), 28 U.S.C.A.; *Johnson v. New York, New Haven & H. R. R. Co.* (1952) 344 U.S. 48, 73 S.Ct. 125, 97 L.Ed. 77 (defendant had moved, after the verdict, only to set it aside and had not also moved to enter a judgment notwithstanding

the verdict; Court of Appeals therefore had no power to direct such a judgment); see also *Eckensrode v. Pennsylvania R. R. Co.* (1948) 335 U.S. 329, 69 S.Ct. 91, 93 L.Ed. 41, and *Berry v. United States* (1941) 312 U.S. 450, 61 S.Ct. 637, 85 L.Ed. 945.

For additional analysis of the amendment, see Corwin ed., *The Constitution of the United States* (1953) pp. 891-897.

126. *Stack v. Boyle* (1951) 342 U.S. 1, 5, 72 S.Ct. 1, 96 L.Ed. 3. "The traditional standards as expressed in the Federal Rules of Criminal Procedure are to be applied in each case to each defendant." Fn. 3 there gives this: "Amount. If the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the de-

tion of objectionable aliens), the Attorney General may hold the aliens in custody without bail pending a determination as to their deportability, for the constitutional limitation applies only to situations where bail is proper and may be set.¹²⁷

Excessive fines are not much before the court,¹²⁸ and neither are cases involving cruel and unusual punishment, e. g., the only one in which a sentence was so termed and set aside required the prisoner to wear a chain hung from a wrist to ankle.¹²⁹ In one recent case an electrocution effort was thwarted because of some mechanical difficulty, but the Supreme Court permitted the state to try again, and in 1962 a narcotics "addiction" law was denounced.¹³⁰

§ 344. — — — Due Process of Law—Procedural

The division of the 5th Amendment's Due Process Clause into substantive and procedural, made in § 334, is also utilized in Chapters XVIII and XIX, where we develop these limitations upon the states under the 14th Amendment; both clauses require adequate notice¹³¹ and a fair hearing. We must, of

fendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant." Where certiorari has been granted, and the case submitted on the merits, and before any decision the defendant jumps bail and flees from the United States, the Court will remove the case from the docket and postpone review indefinitely. *Eisler v. United States* (1949) 338 U.S. 189, 190, 69 S.Ct. 1453, 93 L.Ed. 1897. Dissents were registered from the majority's refusal to review, two Justices feeling the merits should be examined, but two others felt there should be an outright dismissal.

127. *Carlson v. Landon* (1952) 342 U.S. 524, 544-546, 72 S.Ct. 525, 96 L.Ed. 547. In the *Stack* case, *supra* note 115, at p. 7, the court said that the proper procedure to reduce bail is by a motion in the district court, with the right of appeal, and not by a writ of habeas corpus; in this *Carlson* case a writ of habeas corpus was used, but no mention of procedure was made, as here bail was not proper so that a motion to reduce was unavailable.

128. See, e. g., *Ex parte Watkins* (1833) 7 Pet. 568, 8 L.Ed. 786, and

United States ex rel. Milwaukee Social Democratic Publ. Co. v. Burleson (1921) 255 U.S. 407, 435-436, 41 S.Ct. 352, 65 L.Ed. 704, where Brandeis' dissent castigates the Postmaster General's revocation of a second-class mail permit and points to the "fine" thereby imposed through the daily increase in rates which, he says, "is not only unusual in character; it is, so far as known, unprecedented in American legal history."

129. *Weems v. United States* (1910) 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793.

130. *Louisiana ex rel. Francis v. Resweber* (1947) 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422; *Robinson v. California* (1962) 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758. See also *Trop v. Dulles* (1958) 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630, holding there unconstitutional the deprivation of citizenship as cruel and unusual punishment.

131. E. g., in *Blackmer v. United States* (1932) 284 U.S. 421, 440, 52 S.Ct. 252, 76 L.Ed. 375, *Blackmer* resided in France though retaining American nationality. The District of Columbia district court caused a subpoena to be served upon him in France, and upon his

course, differentiate between an administrative proceeding,¹³² a military trial,¹³³ and a criminal and civil¹³⁴ matter, especially the former, for the specific guarantees of the other amendments and the other clauses in the 5th, are supplemented by those found in the present guarantees.

§ 345. — — — Appeal and Post-Conviction Safeguards

We discuss these items more fully in §§ 434–435, although in the federal jurisdiction it is the federal statutes which control, e. g., as in the request for a speedy arraignment mentioned in § 341.

§ 346. — — — Military Law

Military law and military government are exempted from constitutional inhibitions in many ways, but they are not completely free;¹³⁵ martial law, however, permits many things to be done which cannot otherwise be done.¹³⁶ Art. I, § 8, cl. 14, empowers Congress "To make Rules for the Government and Regulation of the land and naval forces," and this "creates an exception to the normal method of trial . . . and permits Congress to authorize military trial of members of the armed services with-

failure to respond held him in contempt, seized property, and satisfied the fine and costs out of it. The proceedings were upheld because "suitable notice and an opportunity to appear and be heard" had been given.

132. Chapter IX concerned itself with the administrative proceeding, particularly in §§ 185 to 190. In such administrative proceedings there is a difference in the kind of procedure required and that found in judicial proceedings. In 1878 the Supreme Court felt that the meaning of the words "as found in the 5th Amendment, . . . do not necessarily imply a regular proceeding in a court of justice, or after the manner of such courts." *Davidson v. Board of Administration of City of New Orleans* (1878) 96 U.S. 97, 102, 24 L.Ed. 616. In other words, the court proceedings are superior to the administrative proceedings in complying with the procedural mandates of the 5th Amendment.

133. In the armed forces trial by military tribunals is held to be due process. *Reaves v. Ainsworth*

(1911) 219 U.S. 296, 304, 31 S.Ct. 230, 55 L.Ed. 225, *United States ex rel. Creary v. Weeks* (1922) 259 U.S. 336, 42 S.Ct. 509, 66 L.Ed. 973.

134. E. g., "In all [judicial] cases, that kind of procedure is due process of law, which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts." *Ex parte Wall* (1883) 107 U.S. 265, 289, 2 S.Ct. 569, 27 L.Ed. 552.

135. Limited habeas corpus is available to test jurisdiction over the crime and the person, and also to ascertain if Congressionally-required procedures have been followed, or if there is a constitutional defect present. *Hiatt v. Brown* (1950) 339 U.S. 103, 70 S.Ct. 495, 94 L.Ed. 691, *Whelchel v. McDonald* (1950) 340 U.S. 122, 71 S.Ct. 146, 95 L.Ed. 141, *Burns v. Wilson*, *infra* note 138. See also § 344, note 132.

136. Martial law, and also military government, have been discussed in § 138. Several additional items appear here.

out all the safeguards given an accused by Article III and the Bill of Rights.”¹³⁷ For example, no indictment is required (5th Amend.), nor is a jury necessary (Art. III, § 2, cl. 3), but apparently the double jeopardy and procedural due process requirements of the 5th Amendment are.¹³⁸

Who is, and who is not, subject to military law? Obviously all persons in or closely connected with and to the military, so that “civilians performing services for the armed forces ‘in the field’ during time of war” are so amenable to military law.¹³⁹ But a former serviceman cannot be tried by the military for a crime allegedly committed prior to his discharge, nor can the wife of a serviceman be so tried for his murder while she was residing with him at an Air Force base in England.¹⁴⁰

“It must be emphasized that every person who comes within the jurisdiction of courts-martial is subject to military law—law that is substantially different from the law which governs civilian society. Military law is, in many respects, harsh law which is frequently cast in very sweeping and vague terms. It emphasizes the iron hand of discipline more than it does the even scales of justice. Moreover, it has not yet been definitely established to what extent the President, as Commander-in-Chief of the armed forces, or his delegates, can promulgate, supplement or change substantive military law as well as the procedures of military courts in time of peace, or in time of war. In any event, Congress has given the President broad discretion to provide the rules governing military trials. . . . If the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers.”¹⁴¹

137. *Reid v. Covert* (1957) 354 U.S. 1, 19, 77 S.Ct. 1222, 1 L.Ed.2d 1148.

138. *Wade v. Hunter* (1949) 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 947, *Burns v. Wilson* (1953) 346 U.S. 137, 73 S.Ct. 1045, 97 L.Ed. 1508.

139. *Reid v. Covert*, *supra* note 137, at p. 33.

140. *United States ex rel. Toth v. Quarles* (1955) 350 U.S. 11, 76 S.Ct. 1, 100 L.Ed. 8; *Reid v. Covert*, *supra* note 137.

141. *Reid v. Covert*, *supra* note 137, at p. 38. See also *Kinsella v. United States ex rel. Singleton* (1960) 361 U.S. 234, 80 S.Ct. 297, 4 L.Ed. 2d 268; *Girsham v. Hagan* (1960) 361 U.S. 278, 80 S.Ct. 310, 4 L.Ed. 2d 279; and *McElroy v. United States ex rel. Guagliardo etc.* (1960) 361 U.S. 281, 80 S.Ct. 305, 4 L.Ed. 2d 282.

§ 347. Substantive and Procedural Due Process—Another Point of View

A completely different point of view may here be stated, and this from the point of view of power, i. e., after the judiciary has reviewed and denounced the legislation or the act, what can the government now do? What we state here is true also for the due process aspects applied to the states (§§ 385, 410).

Assuming that the courts hold federal legislation bad under the substantive requirements of due process, then the result is that the government just doesn't have any power to do what it wants to do in the particular and narrow field involved. For example, we saw in our analysis of the Commerce Clause (Chapter X) that the federal government tried to control agriculture by the first triple-A through its use of the Tax Clause; however, this could not be done, because this Clause was not able to provide the federal base or power for this purpose; and yet, under the Commerce Clause the second triple-A was upheld.¹⁴² In each instance a particular clause could be examined to determine whether or not it, *per se*, had or contained within itself a sufficiency of power for the federal government to do as it desired. In the one instance the answer was no; in the other, yes. Thus a particular clause was interpreted yes or no as then involved. Suppose, however, that no particular clause can be pointed to or, if there is one, then it is not clear-cut; in this situation, but especially where the general powers of the government are sought to be used (as in the state's general police power area), a person may seek protection in a due process argument, contending that the government's actions or law exceeds the limitations placed upon it by the substantive portion of the Due Process Clause.

The contentions are not of moment here; what is of interest to us is what happens if the courts accept the argument and denounce the government's act. In this situation the court in effect holds that there is absolutely no power in the government (under the general argument) or under the particular clause (under the particular argument) for the statute or the act to be permitted. This prevents the government from acting under its general or particular powers, and unless a judicial reversal or a constitutional amendment occurs, the government cannot act. For example, the Supreme Court held that the government could not violate the constitutional provisions requiring apportionment of direct taxes, and so the 16th Amendment was enacted to overcome this holding

142. *United States v. Butler* (1936) 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477, denouncing the first triple-A because the Tax Clause could not be so used; *Mulford v. Smith* (1939) 307 U.S. 38, 59 S.Ct. 648, 83

L.Ed. 1092, upholding penalties on the marketing of tobacco in excess of quotas under the second triple-A, the commerce powers now being used.

(§§ 69, 271); or, the Court held that the federal government was without power to regulate wages, so as to provide for minimum wages for women under outlined circumstances, and yet later on the Court reversed itself and held to the contrary.¹⁴³

In other words, assuming no constitutional amendment or judicial reversal, a holding that substantive due process voids governmental conduct or legislation means that thereafter the government is without power in this particular area under this particular effort.

This conclusion, however, does not apply to procedural due process. Here we are in an area where the method, rather than the power, is involved. And since there are many and various types of methods which can be employed, the mere judicial fact that one particular method is denounced does not mean that another method cannot be tried. For example, in equal protection matters the question of classification is of great moment, and from this point of view classification may be viewed as a procedural matter. If a particular classification is denounced, there is nothing to prevent the government from trying again, this time with a different method. If it be argued that this permits the government to follow the saying, if at first you don't succeed, try, try, again, the answer is that this is the holding of the courts; also, the consequences would otherwise be disastrous. In general there is no constitutional amendment required or necessarily involved when a procedure is denounced; however, the 11th Amendment may be looked at from this point of view to disclose a procedural denunciation which the Supreme Court had upheld (§ 79). What is generally involved is judicial reversal, where allowed at first or disallowed.

143. *Adkins v. Children's Hospital* (1923) 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785 (denouncing federal statute fixing minimum wages for women and children in the Dis-

trict of Columbia, a board being used for this purpose), overruled in *West Coast Hotel Co. v. Parrish* (1937) 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703.

Chapter XVI

THE 14TH AMENDMENT—BACKGROUND

§ 350. Introduction

The constitutional rights we have been examining touched upon, but did not particularize, those found in and through the 14th Amendment. This Amendment contains five sections, and while §§ 2–4 are of historical value, and perhaps even of present interest,¹ they are not of great importance here. In effect it is only §§ 1 and 5 which concern us, and the latter is the usual enforcement section, i. e., “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” The three “Civil War Amendments” are the first to have such a section attached to amendments, and the reasons for this are explored in §§ 356–360. Parenthetically we may note that it is not until and after 1932 that an enforcement section is again used.

This process of eliminating portions of the 14th Amendment results in leaving but one section, the first, which is required to be analyzed. This first section, however, is probably the greatest single source of the rights of persons and of limitations upon the states that exists in the entire Constitution and all the other Amendments. It contains two sentences, the first of which has been somewhat considered in §§ 250 and 273, where we looked into citizenship and naturalization, and the second of which contains three clauses, two of which are probably the best publicized and known in the country. The three clauses are the Privileges and Immunities Clause (Chap. XVII), the Due Process Clause (Chaps. XVIII and XIX), and the Equal Protection Clause (Chap. XX). The proper understanding of these clauses necessitates some, although necessarily slight, degree of historical introduction, which is the purpose of this Chapter.

§ 351. Constitutional Limitations Before the 14th Amendment —Upon the State Governments

The concept of federalism (Chap. III) demanded two sovereignties, and the scheme of the Constitution recognized the states

1. The second section has to do with the apportionment of representatives in Congress, and seeks to prevent discrimination against the Negroes by reducing such representation in the degree such discrimination occurs; the third section strikes against the participants in the rebellion by making them ineli-

gible to hold federal office, with Congress able to remove this disability; and section 4 has to do with the public debts, and here mentions “emancipation of any slave” as not being a basis for seeking federal moneys. See § 148 also on voting.

as one such, acknowledged their possession of governmental power, and placed certain limitations upon them. Were these powers and limitations sufficiently granted and restricted so as to enable not alone the two sovereignties to co-exist amicably, but also to enable the ultimately governed, i. e., the people, satisfactorily to live, be fruitful, and to multiply? We have already examined the power-limitation concept from the points of view of the federal and state governments, with slight aspects of the peoples' views discussed; now we concentrate upon the persons who must live and exist under these sovereignties, and see how and in what degree they may live freely. To an extent this was done *vis-à-vis* the federal government (Chap. XV), and now we turn to the states. Since we have just remarked that the 14th Amendment's first section is of the greatest importance here, we adopt the general period embracing its ratification and early use as an approximate cut-off date, and look at the limitations upon the states before and after this period.

§ 352. — — Civil Matters—Substance

The states regulated practically all aspects of the daily commercial and personal lives of persons and were limited by remarkably few provisions in the Constitution, e. g., even the Bill of Rights was not a limitation upon the states, substantively or procedurally (Chap. XV). The Commerce Clause was, of course, a check upon their ability to control the commercial intercourse of the nation beyond a certain degree but, as we have seen (Chap. X), this narrowing degree was still rather large until the fourth quarter of the 19th century. The Bill of Rights was a federal, not state, limitation, and so, aside from the grants to the federal government which thereby limited or ousted the states, it was primarily if not solely in Art. I, § 10, and in Art. IV, that substantive restrictions could be found. In the entirety of § 10 there is only one clause of practical importance, the Contract Clause, and in the entirety of Art. IV the only clause of seeming importance is the Privileges and Immunities Clause; in other words, an examination of the only two Constitutional sources for limitations upon the states reveals an amazing scarcity of effective restrictions on behalf of the people. And in § 80 we have seen that this latter P & I Clause was either ignored, emasculated, or misapplied, so that it was of little practical value.

The only real aid persons could find against the states was in the Contract Clause, and in Chap. XIII and § 311 this was seen to be of some help, but not too much. The commerce and police powers of a state (Chaps. X, XIII), where otherwise not limited by the federal government, were thus too much for the people. For example, even though a corporate charter was held to be a con-

tract which the state could not unilaterally breach,² the legislature could now simply add a reservation clause to any issued and thereafter circumvent the Dartmouth College decision; or where a state apparently granted a monopoly,³ tax exemption,⁴ or charter for a term of years to conduct a lottery,⁵ the Supreme Court felt that the state could nevertheless utilize eminent domain⁶ or otherwise reasonably proceed as it desired.⁷ So also a state's police powers could be used, or its powers over its public highways, or its economic interests, or its control over transportation, and this despite the prohibitions of the Contract Clause.⁸

It was not, however, until the Granger Cases of 1877 were decided that the people, i. e., the farmers and the business community, awoke to the exceedingly great power a state now possessed. In that case the Supreme Court upheld state regulation of grain elevators and railroads, the regulation there piercing at the jugular vein of the burgeoning industrial community, namely the private power to determine and fix prices uncontrolled by government.⁹ Even though reversed ten years later this decision provoked legalistic soul and Constitution searching by the lawyers of the "people" so affected, and § 360 details these efforts somewhat.

§ 353. — — — Procedural

To illustrate the civil procedural looseness through one situation only, prior to the 14th Amendment a state might, for example, seek to subject to its powers and jurisdiction a nonresident, who

2. Trustees of Dartmouth College v. Woodward (1819) 4 Wheat. 518, 4 L.Ed. 629.
3. Charles River Bridge v. Warren Bridge (1837) 11 Pet. 420, 9 L.Ed. 773.
4. Piqua Branch of State Bank of Ohio v. Knoop (1853) 16 How. 369, 14 L.Ed. 977 (with three dissents, upholding a tax exemption under an 1845 Ohio statute which did not contain a reservation clause), but subsequent decisions restricted or distinguished this view, e. g., Covington v. Kentucky (1889) 173 U.S. 231, 19 S.Ct. 383, 43 L.Ed. 679, and see also Atlantic Coast Line R. R. Co. v. Phillips (1947) 332 U.S. 168, 67 S.Ct. 1584, 91 L.Ed. 1977.
5. Stone v. Mississippi (1880) 101 U.S. 814, 25 L.Ed. 1079, holding charter subject to state's police powers.
6. West River Bridge v. Dix (1848) 6 How. 507, 12 L.Ed. 535.
7. Of course this was not true in all commercial situations, e. g., Van Hoffman v. Quincy (1867) 4 Wall. 535, 18 L.Ed. 403, and cases cited. See also Home Building & Loan Ass'n v. Blaisdell (1934) 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413, and majority and minority discussions of the Contract Clause, giving background and cases.
8. See Chap. XIII, and also the Minnesota Mortgage Moratorium Case, *supra* note 7, at pp. 436-439, where Chief Justice Hughes gives numerous illustrations.
9. Munn v. Illinois (1877) 94 U.S. 113, 24 L.Ed. 77, overruled in *Wabash, St. Louis & Pac. Ry. Co. v. Illinois* (1886) 118 U.S. 557, 569, 572-573, 7 S.Ct. 4, 30 L.Ed. 244, because interstate commerce was now found to have been overlooked, and this resulted in the Interstate Commerce Commission Act of 1887 which permitted federal control of the reasonableness of such rates.

was never within the state or there had property, and grant a default judgment against such person. When sought to be enforced in another state under the Full Faith and Credit Clause (§ 76) the state and federal courts might refuse so to aid, because of the lack of personal service, but only in such a proceeding could the original judgment be attacked, even though not vacated. If the non-resident had property in the first or forum state then a default judgment obtained as described might be used against the property, and, to the extent of that property, satisfied, for no constitutional limitation was applicable.¹⁰ Of course, with the 14th's limitations available, the proceeding in the forum state itself might now be attacked and held void.¹¹

§ 354. — — Criminal Matters—Substance

The only criminal limitations upon the states, found in the Constitution, are those in Art. I, § 10, concerning a bill of attainder and *ex post facto* law (see §§ 308–310). Since the Bill of Rights limited only the federal government, then its prohibitions in this area were unavailing as against the states (§ 327). The bill of attainder legislatively singles out a person and inflicts a punishment without a judicial trial, and so may be considered substantive,¹² as may an *ex post facto* law which, in effect, creates or defines a new crime upon old facts.¹³ Both were of little aid.

§ 355. — — — Procedural

We have just seen that no constitutional criminal limitations, procedurally, are to be found save insofar as an *ex post facto* law may be so considered. Since it is a law which changes or increases the consequences of a prior fact-situation, but does not touch the facts as such, or alter the legal rules against a defendant,¹⁴ or otherwise have a retroactive effect, it may conceivably be considered procedural.

10. See, e. g., the discussion and analysis in *Pennoyer v. Neff* (1878) 95 U.S. 714, 24 L.Ed. 565, and also the dissenting opinion at pp. 737, 741–742.

11. Assuming compliance with the state's procedures; see, e. g., *Milliken v. Meyer* (1940) 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278, and *Riverside & Dan Cotton Mills, Inc. v. Menefee* (1915) 237 U.S. 189, 35 S.Ct. 579, 59 L.Ed. 910.

12. See, e. g., *Cummings v. Missouri* (1867) 4 Wall. 377, 323–325, 18 L.Ed. 356.

13. See note 14, *infra*.

14. See, however, *Thompson v. Missouri* (1898) 171 U.S. 380, 18 S.Ct. 922, 43 L.Ed. 204, where the court quotes from *Kring v. Missouri* (1883) 107 U.S. 221, 228, 232, 235, 2 S.Ct. 443, 27 L.Ed. 506, and adopts the view that such a law is "substantial and therefore substantive." Nevertheless, we discuss it both in a substantive and procedural category.

§ 356. Aftermath of the Civil War—The Constitutional Plight of the Negroes—In General

The Constitution, in 1789, referred indirectly to the Negroes then in the United States, e. g., Art. I, § 2, cl. 3, "all other [not 'free'] persons;" § 9, cl. 1, "The Migration or Importation of such Persons;" and Art. IV, § 2, cl. 3, "Person held to Service or Labour." It was not until 1857 that the Supreme Court, in the famous *Dred Scott* case, and for the second time in almost seven decades invalidating an act of Congress, held that the Constitution spoke "not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of the framers" ¹⁵ Scott was held not to come within the provisions of the Constitution on a par with whites, was not and could not become a "citizen" of any state so as to be entitled to any privileges or immunities under the 4th Article, and could not even become a federal citizen by birth or naturalization; in other words, he remained a slave, at least in Missouri. ¹⁶

Regardless of why the Civil War was fought, it resulted in the three amendments of 1865, 1868, and 1870. The 13th Amendment

15. *Dred Scott v. Sandford* (1857) 19 How. 393, 426, 15 L.Ed. 691; see also pp. 410, 411, 419, 426-427. There were nine Justices and nine opinions, albeit one was but one paragraph. Taney delivered the chief one, and Wayne concurred "entirely in the opinion of" Taney (at p. 454); Grier concurred with Taney and Nelson (p. 459); and Campbell concurred with Taney (p. 493). Caton wrote "I concur with my brother judges that the plaintiff, Scott, is a slave," (p. 529) and therefore could not maintain the suit. Nelson and Daniel wrote their separate opinions (Grier concurred with Nelson, *supra*) rejecting Scott's suit. McLean and Curtis each wrote separate dissents from the court's holding. It would thus appear that while seven Justices agreed that Scott should not succeed, only three concurred in Taney's opinion plus one (Caton) who concurred with all the majority judges as indicated.

16. Taney held "the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void" At p. 452 of 19 How.

In other words, before 1868 a state could define for itself its citizens; and grant different groups and classes different privileges or immunities within its borders; these (state) citizens were not necessarily embraced within the Constitution's definition of the term, as found in Art. IV, § 2, and so those not so included could not claim the constitutional rights of a constitutional "citizen." A Negro was therefore not a citizen of any state which did not recognize him as such and grant him that status, nor could a Negro claim that he was independently embraced within the definition of a "citizen" as found in the Constitution; furthermore, even if one state granted him such a status, the Negro could not take it with him outside the borders of the granting state, nor could he rely upon the Constitution to protect him in his position. The southern states could thus reject Negroes as citizens, refuse to recognize them as such even though other states so did, and could and did continue to discriminate against them. Forkosch, *American Democracy and Procedural Due Process*, 24 Bklyn.L.Rev. 173, 178, fn. 16.

The *Dred Scott* case is discussed further in § 359.

negated "slavery" and also "involuntary servitude,"¹⁷ and was taken almost verbatim from Art. 6 of the Northwest Ordinance of 1787.¹⁸ Since Taney's court had struck down § 8 of the Act of 1820, known as the Missouri Compromise, because it "is not warranted by the Constitution, and is therefore void," the 13th Amendment's second section gave Congress "power to enforce this article by appropriate legislation."

§ 357. — — Personal and Civil Rights—Privileges and Immunities

The 13th Amendment passed the Senate on April 8, 1864, but was not proposed until January 31, 1865, when it passed the House, and on December 9th of that year was ratified. The Civil War was thus still being fought when Congress discussed and proposed this addition, so that it did not anticipate the efforts of the southern states to preserve their earlier ways of life. These latter enacted the infamous "Black Codes" which, for example, provided that "Every civil officer shall, and every person may, arrest and carry back to his or her legal employer any freedman, free negro, or mulatto who shall have quit the service of his or her employer before the expiration of his or her term of service without good cause," and also provided that, upon non-payment of a fine imposed for a penal offense, "such person shall be hired out by the sheriff . . . to any white person who will pay said fine and all costs, and take the convict for the shortest time."¹⁹ The temper of the Reconstruction Congress is historically known by its later impeachment and barely unsuccessful trial of President Johnson, so that it is not unreasonable to assume that federal legislation would be directed at both invalidating these Codes and aiding the Negroes. The Civil Rights Act of April 9, 1866²⁰ sought to do just this. Its second section made it a federal misdemeanor to deprive any "inhabitant of any State or Territory . . . of any right secured or protected by this act," and its famous first section in full provided:

"That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are

17. Construed to mean "personal servitude," to apply only to human beings, and to be "of larger meaning than slavery." *Slaughter-House Cases* (1873) 16 Wall. 36, 69, 71-72, 21 L.Ed. 394. See also § 326 on slavery.

18. See discussion in *Bailey v. Alabama* (1911) 219 U.S. 219, 240, 31 S.Ct. 145, 55 L.Ed. 191.

19. *Mississippi Laws [Civil Rights of Freedmen]* of 1865, p. 82ff., Sec.

7, and [Penal Laws] p. 165f., § 5; see also the similarly severe codes of Louisiana, although Georgia, for example, was lenient. The Codes sought to regulate the economic, political, and social lives of the Negroes.

20. 14 Stat. 27; it was passed on March 13th, vetoed by Johnson on March 27th, and re-passed on April 9th.

hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties; and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

President Johnson's veto message felt that since the federal government could confer only federal, and not state, citizenship, and if native-born persons were such by virtue of the Constitution, then the act was unnecessary; that if they were not citizens and the act sought to make them such, "the grave question presents itself whether, when eleven of the thirty-six States are unrepresented in Congress at the present time, it is sound policy" so to do, especially since the Negroes could receive the benefits of the act, as did "all domiciled aliens and foreigners," without necessarily being made federal citizens; furthermore, the act enumerated the rights of these newly-made citizens, made them punishable as were the whites, and so attempted to create "a perfect equality of the white and colored races," which flew in the face of innumerable state laws, and perhaps could lead, if it now did not, to federal abrogation of all discriminatory state laws involving the Negroes; and while Congress might have such a power, over the federal Territories, it did not have it over the states.²¹ Although Congress before and now rejected these arguments it did not overlook them, and even while the bill was being enacted a second constitutional amendment was being prepared by the Joint Committee on Reconstruction, appointed the previous December, and composed of six Senators and nine Representatives. After the enactment of this statute the Joint Committee reported on June 20, 1866, recom-

21. Richardson, *Messages and Papers of the Presidents* (1897) VI, 405ff. The "Strong post-war feeling," and some of the background of the 1866 Act, is referred to by Justice Frankfurter in *United States v. Williams* (1951) 341 U.S. 70, 73-75, 71 S.Ct. 595, 95 L.Ed. 758. This case involved an indictment of the head of a private detective agency who obtained confessions by force or violence. There were three cases. The first held the defendants were not put

in double jeopardy, *United States v. Williams* (1951) 341 U.S. 58, 71 S.Ct. 581, 95 L.Ed. 747; the second is the one cited, and discussed throughout; the third, *Williams v. United States* (1951) 341 U.S. 97, 71 S.Ct. 576, 95 L.Ed. 774, upheld the conviction because the defendant held a special police officer's card issued by the City of Miami, had taken an oath as such, and a regular police officer had been detailed to attend the investigation.

mending that the former Confederate states were not entitled to representation, and that it was Congress and not the President which had authority over the process of reconstruction. In his December 3d Message to Congress that year President Johnson expressed "profound regret that Congress has thus far failed to admit to seats loyal Senators and Representatives" from the defeated south, and by March 2, 1867, the First Reconstruction Act was passed, with the Second following on March 23d.²²

The Joint Committee, as has been related, felt somewhat queasy about the power of Congress over the Civil Rights bills which had been introduced, and even before these became law on April 9, 1866, had proposed a constitutional amendment on February 13th and 26th. This stated that "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property." This proposal was debated in the House, but nothing occurred,²³ and on April 30, 1866, the Committee proposed another amendment, the opening section of which read: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The last (fifth) section of this new proposal conferred upon Congress, as did the 13th Amendment (§ 356), "power to enforce, by appropriate legislation, the provisions of this article." In effect, therefore, the present 14th Amendment's first sec-

22. 14 Stat. 428, and 15 id. 2. Johnson's vetoes of both Acts were unavailing. Richardson, Messages, supra note 21, at p. 498ff., and 531ff., and it was his removal of Secretary Stanton in violation of the Tenure of Office Act of March 2, 1867, 14 Stat. 430, which precipitated his impeachment. A Third Reconstruction Act, passed July 19, 1867, 15 Stat. 14, was designed to clarify certain portions of the previous Act. A Fourth, of March 11, 1868, 15 Stat. 41, amended the Second Act.

The first two Acts were sought to be invalidated in two original suits brought in the Supreme Court, the first against Johnson seeking to restrain him from executing them, and the second against the Secretary of War Stanton and Generals Grant and Pope likewise to so enjoin them, but in both instances

the Supreme Court rejected jurisdiction. *Mississippi v. Johnson* (1867) 4 Wall. 475, 18 L.Ed. 437, and *Georgia v. Stanton* (1867) 6 Wall. 50, 18 L.Ed. 721. A third case, *Ex parte McCardle* (1869) 7 Wall. 506, 19 L.Ed. 264, involved habeas corpus proceedings against a military detention under different aspects of other statutes.

23. There were other versions of amendments, e. g., "Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States, in every State, the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty, and property." Quoted by Barrett, Bruton, Honnold, *Constitutional Law, Cases and Materials* (1959) p. 583, fn. 8.

tion, second sentence, as well as its last section, were already cast in their final form, and it remained for the Senate, on May 30th, to add the present first sentence of the first section as an amendment.²⁴ The Senate passed the proposal for the amendment on June 8th, and on June 13th the House did likewise.²⁵ Ratification occurred two years later, in July of 1868.

The Civil Rights Act of 1866, as above described, could now seemingly find a solid constitutional basis, but apparently four months after the ratification of the 15th Amendment, and on May 31, 1870, Congress added to a voting measure (§ 358) a section derived from old § 2 of the Civil Rights Act of 1866, discussed above. This addition, § 17, was designed to "secure to all persons the equal protection of the laws." The method was by fine and imprisonment of "any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by the last preceding section of this act, or to different punishment, pains or penalties on account of such person being an alien, or by reason of his color or race, than is prescribed for punishment of citizens" ²⁶ This statute "is clearly corrective in its character, intended to counteract and furnish redress against state laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified." Put differently § 17 was held to be "analogous in its character to what a law would have been under the original Constitution, declaring that the validity of contracts should not be impaired, and that if any person bound by a contract should refuse to comply with it, under color or pretense that it had been rendered void or invalid by a state law, he should be liable to an action upon it in the courts of the United States, with the addition of a penalty for setting up such an unjust and unconstitutional defense." ²⁷

24. On the above, see Freund, Sutherland, Howe, and Brown, *Constitutional Law, Cases and Other Problems* (1961) II, pp. 880-881.

25. Cong. Globe, 39th Cong., 1st Sess., 3042, and 3148-3149, appearing officially in 14 Stat. 358, under date of June 16, 1866; by Joint Resolution of July 21, 1868, Congress declared it part of the Constitution, 15 Stat. 709-710, and the Secretary of State certified it as such on July 28th, 15 Stat. 708-711. The reason for these resolutions and certifications was that Ohio, New Jersey, and Oregon, had withdrawn their ratifications before the re-

quired three-quarters of the states had acted, but even if these withdrawals were effective, the last required state ratified on July 21st. This last state was Georgia, and while the proposal was rejected by most of the southern states, its ratification was made a condition of restoration to the Union.

26. Quoted in *United States v. Williams*, supra note 21, at p. 73.

27. *Civil Rights Cases* (1883) 109 U. S. 3, 16, 17, 27 L.Ed. 836. See, on quotation in text, note 36, *infra*, and quotation from Frankfurter.

These first two Civil Rights Acts of 1866 and 1870 were later added to by a third 1871 statute amending the 1870 Enforcement Act, and a fourth Ku Klux Klan Act of 1871;²⁸ the fifth Civil Rights Act of March 1, 1875, was "An Act to protect all Citizens in their civil and legal rights," and was specifically designed to enable the Negroes to obtain equality with the whites insofar as accommodations at inns, public conveyances, theatres, etc., were concerned.²⁹ Within a few years four indictments were brought under the 1875 Act against innkeepers in Kansas and in Missouri who refused to accommodate Negroes, a theatre owner in California who refused a Negro a seat in the dress circle, and one in New York who refused "the full enjoyment of the accommodations of" the Grand Opera House to "another person, whose color is not stated;" and a fifth suit was brought by a Negro and his wife in Tennessee for the penalty allowed, claiming the defendant railroad's conductor had refused to allow the wife to ride in the ladies' car. The only question was, "Has Congress constitutional power to make such a law?" Despite a powerful dissent by Justice Harlan, the rest of the court agreed with Justice Bradley that "the prohibitions of the [14th] Amendment," which was argued gave constitutional support to Congress, "are against state laws and acts done under state authority In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the Amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which, by the Amendment, they are prohibited from committing or taking."³⁰

28. Respectively, 16 Stat. 433, and 17 id. 13; see also notes 29, 30, and 36, *infra*, esp. discussion of the *Monroe v. Pape* case in last note.

29. 18 Stat. 335. The Act was, as were all of the five Civil Rights Acts, applicable to "all Citizens" and not limited to Negroes. Violations were misdemeanors, and the person so treated could sue for penalty damages.

30. Civil Rights Cases, *supra* note 27, at pp. 4, 10, 13-14. As this and the following section disclose, the Civil Rights Acts have been denounced and upheld in varying degrees and parts, summarized in the *Williams* case, *supra* note 21, at pp. 77-81, and also *Emerson* and

Haber, *Political and Civil Rights in the United States* (1952) at pp. 40-44, giving references and citations. For their current status see the Appendix in the *Williams* case, at p. 83, and also *Carr*, *Federal Protection of Civil Rights* (1947) Appendix 2. In *Rhodes v. Houston* (D.C.Nebr.1962) 202 F.Supp. 620 a complaint under the civil rights statutes sought damages against state judges, clerks of court, prosecuting attorneys, sheriffs, police officers, and prison wardens, also alleging a conspiracy; the complaint was dismissed because the state court had jurisdiction of the contempt proceedings, and immunity therefore attached.

§ 358. — — Political Rights—Voting

There are many rights which can be denominated as political, e. g., assembly, petition, but we concentrate upon voting.³¹ The Negroes had not, of course, been able to vote in the southern states (and many of the northern ones) before the Civil War, and during the Reconstruction Era they did not fare better. The 13th Amendment freed them from slavery and involuntary servitude but did not give them any voting rights. Their efforts to vote were frustrated by various methods, e. g., the menace of the Ku Klux Klan. Thus the second section of the 14th Amendment sought to overcome these political frustrations by penalizing the discriminating states through a reduction in their representation. This was accomplished by first apportioning the Congressional representatives among the states by "counting the whole number of persons in each State, excluding Indians not taxed;" then, if Negroes were discriminated against, and their right to vote denied or abridged in elections not only for the federal President and Vice President, Senators and Representatives, but also for "the Executive and Judicial officers of a State, or the members of the Legislature thereof . . . the basis of representation therein shall be reduced in the proportion which the number of such" persons discriminated against "bear to the whole number of citizens in the State."³²

This weak provision was highly inadequate and so on February 26, 1869, Congress proposed the 15th Amendment, which was ratified the following year on February 3d. This Amendment, in its § 2, gave Congress the power to enforce its provisions by appropriate legislation, and its § 1 was exceedingly pithy: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of

31. For example, in *Collins v. Hardyman* (1951) 341 U.S. 651, 662, 71 S.Ct. 937, 95 L.Ed. 1253, federal citizens attempted to hold a public meeting to oppose the Marshall Plan, at which a resolution would be adopted and forwarded to the appropriate federal officers; the meeting was forcibly and violently disrupted by defendants, who also assaulted and intimidated those present; and plaintiffs now sued in conspiracy for civil damages under 8 U.S.C.A. § 47(3) which provided a civil penalty in case of a conspiracy depriving persons "of the equal protection of the law, or of equal privileges and immunities under the laws." A majority of six Justices rejected the suit because the statute gave no cause of

action against private persons in such a case and defendants could not, by their violence, etc., impair the plaintiffs' rights; they said nothing, however, about Congress' power to authorize such a suit, merely that it had not been authorized by the statute.

32. Certain language has been omitted. This provision abrogated Art. I, § 2, cl. 3 of the Constitution which counted only three-fifths of the Negroes. *Elk v. Wilkins* (1884) 112 U.S. 94, 102, 5 S.Ct. 41, 28 L. Ed. 643. This section has not withdrawn from Congress its power, under Art. I, § 2 to control federal election requirements. *Ex parte Yarbrough* (1884) 110 U.S. 651, 663, 4 S.Ct. 152, 28 L.Ed. 274.

race, color, or previous condition of servitude.” This struck at not only the federal government but also at “any State” which deprived a Negro of his right to vote. But whereas the 14th Amendment’s § 2 specified the penalty, the new 15th Amendment left this up to Congress. In less than four months, and on May 31, 1870, the Enforcement Act of 1870 was passed; this statute was entitled “An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes.”³³ Sections 2 and 3 made it a misdemeanor for any person or officer wrongfully to fail to carry out the duties imposed on him by state law in the registering or voting of persons, and section 4 made interference with elections by private persons through force, bribery, etc. also a misdemeanor. Section 6 then said “That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States or because of his having exercised the same,” certain punishments would follow. The Ku Klux Klan, if not mentioned by name, was certainly meant.

This Enforcement Act of 1870 not only struck against official and private interference with voting rights, but its § 6 struck at conspiracies to deprive the Negroes of their rights or privileges granted or secured by the Constitution or federal laws. Thus the constitutional second section of the 14th Amendment was too ineffective for the evils then occurring, and the 15th Amendment limited its prohibitions to “the United States or . . . any State,” and only for deprivations based upon “race, color, or previous condition of servitude,” so that the Enforcement Act broadened the coverage and the scope. However, in 1876, the Supreme Court, in two cases decided simultaneously, the first involving §§ 3 and 4 of the Act, and the second involving its § 6, felt that federal prosecutions could not lie because of faulty indictments in the first case, and also because “The power of Congress to legislate at all upon the subject of voting at state elections rests upon this [15th] Amendment,” and “It has not been contended, nor can it be, that the Amendment confers authority to impose penalties for every wrongful refusal to receive the vote of a qualified elector at state elections. It is only when the wrongful refusal at such an election is because of race, color, or previous condition of servitude, that Congress can interfere and provide for its punishment.

33. 16 Stat. 140, chap. 114. See *United States v. Reese*, *infra* note 34, and *United States v. Cruikshank* (1876) 92 U.S. 542, 23 L.Ed.

588, as well as the *Williams* case, *supra* note 21, at pp. 73-76, for the sections and background discussions.

If therefore, the 3d and 4th sections of the Act are beyond that limit, they are unauthorized.”³⁴ In the second case the various counts of the indictment were also held too poorly drawn so as to come within the requirements of § 6, and insofar as these were sought to be laid under portions of the Bill of Rights it was held unavailing because these latter limited only the federal government; insofar as the 14th Amendment was sought to be made the basis for the indictment the court also held against the government, for “The only obligation resting upon the United States is to see that the States do not deny the right of [equality]. This the Amendment guarantees, but no more. The power of the National Government is limited to the enforcement of this guaranty.”³⁵

These cases were brought under the Enforcement Act of 1870, but in § 357 we have cited five Civil Rights Acts, one of them being the K. K. K. Act of 1871. In upholding an action under this Act’s § 1, but involving a fact-situation where the complainants allegedly had been subjected to an unlawful search and seizure, the majority opinion stated that “the history of the section of the Civil Rights Act presently involved does not permit such a narrow interpretation” as that given in the Williams case to the 1866 earlier Civil Rights Act.³⁶ The federal power to control elections

34. *United States v. Reese* (1876) 92 U.S. 214, 218, 23 L.Ed. 563; the *Cruikshank* case, *supra* note 33, at p. 555, and see also *James v. Bowman* (1903) 190 U.S. 127, 136, 23 S.Ct. 678, 47 L.Ed. 979, denouncing similarly another provision. The *Ku Klux Klan* Act of April 20, 1871, 17 Stat. 13, sought to insure the full benefits to the Negroes of the three Civil War Amendments. However, in *United States v. Harris* (1883) 106 U.S. 629, 637-639, 1 S.Ct. 601, 27 L.Ed. 290, the important parts of the act were held unconstitutional for reasons similar to those given in the *Reese* and *Cruikshank* cases. See additionally the *Civil Rights Cases*, *supra* note 27.

35. The *Cruikshank* case, *supra* note 33, at p. 555.

36. In *Monroe v. Pape* (1961) 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492, there were three opinions, that of Justice Douglas for the majority, that of Harlan (Stewart concurring) for a concurring minority, and that of Frankfurter dissenting (except as to a portion of the holding that the action cannot be main-

tained against Chicago). Eight of the Justices agreed that the *Screws*, *infra*, and *Classic*, see § 148, note 8, cases were correctly decided, and that because the statutes there and here were substantially identical in the particular phrasing of “under color of any statute,” the instant case should be likewise decided in that vein. The opinions delve deeply into the historic background of the 1871 statute, and also give the current statutes. See also § 337, notes 86 and 88, *supra*.

See §§ 147 and 148, and particularly *Ex parte Siebold* (1880) 100 U.S. 371, 25 L.Ed. 717, upholding the constitutionality of a different statute, enacted February 28, 1871, 16 Stat. 433, which assimilated a state penal law providing for criminal punishment for stuffing ballot boxes; see also the *Williams* case, *supra* note 21, as well as the *Williams* case at p. 97, and the *Yarborough* case, *supra* note 32, and *Screws v. United States* (1945) 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495.

In the *Williams* case, speaking respectively for two minorities of four (Black concurred in dismiss-

involving federal offices, to prevent fraud, etc., and to assimilate state laws likewise striking at these practices, is thus still able to be exercised.

§ 359. — — Citizenship

The Constitution is not silent about either state or federal citizenship but specifically mentions these. For example, in Art. IV, § 2, cl. 1, it speaks of "The Citizens of each State," and gives them privileges and immunities (§ 80), and in Art. III, § 2, cl. 1, it extends the judicial power to suits between "a State and Citizens of another State;—between Citizens of different States" (§ 67) So in Art. II, § 1, cl. 5, do we find that "No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President" (§ 120); and the 11th Amendment prevented suits against the states, without their consent, "by Citizens of another State, or by Citizens or Subjects of any Foreign State." (§ 79)

How did one acquire state or federal citizenship before 1868? A state could simply and easily grant it, and Congress had power under Art. I, § 8, cl. 4, to enact laws upon naturalization. But, did

ing the indictment on grounds of res judicata and refused to go into any other discussion), Justices Frankfurter and Douglas disagreed upon the interpretations to be given to the modern counterparts of § 2 of the Civil Rights Act of 1866, which became § 17 of the Enforcement Act of 1870 (see § 357), and § 6 of the Enforcement Act of 1870. Frankfurter felt "that the rights which § 6 protects are those which Congress can beyond doubt constitutionally secure against interference by private individuals . . . [and] this category includes rights which arise from the relationship of the individual and the Federal Government. The right of citizens to vote in congressional elections, for instance, may obviously be protected by Congress from individual as well as from State interference." But, as against this category where a federal-private umbilical cord is thus found, there is a second, namely, "those rights which the Constitution merely guarantees from interference by a state." The first involves "the substantive powers of the Federal Government and may clearly be protected from private interfer-

ence," while the second involves "interests which the Constitution only guarantees from interference by States" Pp. 77-78.

Douglas compared the language of the re-enacted sections, found "no major difference between . . . [them] apparent from the words themselves, [and thought] it is strange to hear it said that though [§ 2] extends to rights guaranteed against state action by the Fourteenth Amendment, [§ 6] is limited to rights which the Federal Government can secure against invasion by private persons." P. 88. "The distinction now urged has not been noticed by students of the period." P. 90. See also the Civil Rights Cases, quotation keyed to note 27, *supra*.

On references to "color of statute," or "color of law," or like terms, and their requirement, see Emerson, *supra* note 30, pp. 43-95.

On September 14, 1962, a proposed (24th) Amendment was forwarded to the fifty states, eliminating poll taxes for federal elections if ratified by three-quarters of the states within seven years.

state citizenship carry with it federal citizenship, or did federal carry with it state, or did both carry with them each other? Marshall, in 1804, agreed that a person "having been born within the United States, and not being proved to have expatriated himself according to any form prescribed by law, is said to remain a citizen The American citizen who goes into a foreign country, although he owes local and temporal allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protection of his own government" ³⁷ In effect, said the Chief Justice, a person born in the United States is (usually) a citizen of the United States. What was the consequence of this federal citizenship? In 1832 Marshall answered this question, in a diversity suit, where the defendant was "alleged in the proceedings to be a citizen of the United States, naturalized in Louisiana, and residing there. This is equivalent to an averment that he is a citizen of that State. A citizen of the United States, residing in any State of the Union, is a citizen of that State." ³⁸ The federal government thus could naturalize an alien, or a person could be born here, and in both cases this federal citizen now could automatically become a citizen of a state by residing there. What of the converse, namely, could a state confer state citizenship upon a person not a federal citizen, so that this state citizen might either now be entitled automatically to become a federal citizen (and thereby a citizen of another state by residence) or else, under Art. IV, § 2, cl. 1, be entitled to another state's privileges and immunities, when traveling there? Chief Justice Taney, in 1849, felt the answer was no, that one state could not confer a citizenship which became either national or entitled to privileges and immunities elsewhere, and that only through the Naturalization Clause (§ 250), apart from birth, could such a federal citizenship be conferred. ³⁹

37. *Murray v. Schooner Charming Betsy* (1804) 2 Cr. 64, 119-120, 2 L. Ed. 208.

38. *Gassies v. Ballou* (1832) 6 Pet. 761, 762, 8 L.Ed. 573.

39. "Its [Naturalization Clause] sole object was to prevent one State from forcing upon all the others, and upon the general government, persons as citizens whom they were unwilling to admit as such." *Passenger Cases* (1849) 7 How. 283, 483, 12 L.Ed. 702. At pp. 482-483 he wrote: "Under the Constitution of the United States, citizens of each State are entitled to the privileges and immunities of citizens in the several States; and no State would be willing that another State should determine for it what for-

eigner should become one of its citizens, and be entitled to hold lands and to vote at its elections. For, without this provision, any one State could have given the right of citizenship in every other State; and, as every citizen of a State is also a citizen of the United States, a single State, without this provision, might have given to any number of foreigners it pleased the right to all the privileges of citizenship in commerce, trade and navigation, although they did not even reside amongst us."

Although Taney's views were given in a dissenting opinion, "they do not relate to the matter on which the dissent was founded. They accord" with the unanimous views of the 1868 bench. *Crandall v. Ne-*

Upon these principles did Dred Scott, in 1857, claim to be able, as a Missouri citizen, to sue Sandford, a New York citizen, in the federal district court in Missouri on trespass. Scott alleged that he, his wife, and their two infant daughters were assaulted by the defendant, imprisoned for six hours, and threatened and restrained of their liberty, all to their damage each in the amounts of \$2,500 and \$3,000. Sandford objected to the diversity jurisdiction of the court in that "said plaintiff Dred Scott is not a citizen of the State of Missouri . . . because he is a negro of African descent," etc.⁴⁰ The bench, save for two changes, was identical as to seven of the Justices who had, in the 1849 Passenger Cases, apparently consented to Taney's views as to citizenship. In that case, however, Taney had also written, although concerning Art. I, § 9, cl. 1, that "The framers of the Constitution were unwilling [there] to use the word 'slaves' . . . and described them as persons," but that this word "was always applied to matters of property. The whole context of the sentence . . . show that it was intended to embrace those persons only who were brought in as property."⁴¹ Now, could Art. III, § 2, cl. 1 be differently construed? ⁴² Taney's approach was to hold that "The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing;" "We must not confound the rights of citizenship which a state may confer within its own limits, and the rights of citizenship as a member of the Union;" that "no State can . . . introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And for the same reason it cannot introduce any person . . . not intended to be [so] embraced . . . but were intended to be excluded from it;" that before the Constitution Negroes "were never thought of or spoken of except as property," and there had occurred "no change when the Constitution was adopted;" that "The legislation of the States" before and after the adoption of the Constitution "shows, in a manner not to be mistaken," that Negroes were not "regarded at

vada (1868) 6 Wall. 35, 49, 18 L.Ed. 745 (two Justices dissented on another aspect but did not disagree with this statement).

See, however, *Marshall v. Baltimore & Ohio R. R. Co.* (1853) 16 How. 314, 329, 14 L.Ed. 953, a 6-3 decision, holding a corporation, chartered by a state, was a citizen and within the diversity jurisdiction of the federal court, and "should enjoy the same privileges [of diversity] in other states . . ."

40. *Supra* note 15, 15 L.Ed. at p. 692.

41. *Supra* note 39, at p. 476.

42. *Ibid.*, at p. 403: "The question is simply this: can a negro, whose ancestors were imported into this country and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen. One of these rights is the privilege of suing in a court of the United States in the cases specified in the Constitution."

that time, as fellow citizens and members of the sovereignty;" that the first Naturalization Law of 1790 "confines the right of becoming citizens 'to aliens being free white persons;'" that "the provision in the Constitution giving privileges of immunities in other States, does not apply to them;"⁴³ so that "upon a full and careful consideration of the subject, the court is of opinion that . . . Dred Scott is not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts. . . ." ⁴⁴

The 13th Amendment reversed Taney's holding as to a Negro's status, and this might therefore give to them a federal and, perhaps, a state citizenship; thus, assuming these results, Dred Scott could now sue. However, did a Negro automatically receive the other Constitutional benefits previously denied to him? For example, could Scott now travel into Alabama and there demand his 4th Article P's and I's? Assuming he was a Missouri citizen, and assuming Alabama did grant general privileges and immunities to its own citizens, the federal courts would undoubtedly enforce such a demand. But, as we have previously seen in §§ 357 and 358, the southern states went to extreme lengths in denying the freed Negroes their political and civil rights; how could these states now deny to the Negro citizens their constitutional privileges and immunities? One simple method was by threats and harassments, e. g., the K.K.K.; another was by forcing suits to be brought, financially and practically difficult, if not impossible; a third was to grant only "Special privileges [to be] enjoyed by citizens in their own States [which] are not secured in other States by this provision;"⁴⁵ and if this meant that Alabama

43. "But if he ranks as a citizen of the State to which he belongs, within the meaning of the Constitution of the United States, then, whenever he goes into another State, the Constitution clothes him, as to the rights of person, with all the privileges and immunities which belong to citizens of the State. And if persons of the African race are citizens of a state, and of the United States, they would be entitled to all of these privileges and immunities in every State, and the State could not restrict them; for they would hold these privileges and immunities, under the paramount authority of the Federal Government, and its courts would be bound to maintain and enforce them, the Constitution and laws of the State to the contrary notwithstanding." At pp. 422-423.

44. *Ibid.*, quotations respectively at pp. 404, 405, 406, 410, 416, 419, 422, and 426-427. Taney also held that Scott had not become free when taken into Illinois. At pp. 452-453. The division of the Justices is given in note 15, *supra*.

45. *Paul v. Virginia* (1869) 8 Wall. 168, 180, 19 L.Ed. 357. See, however, the statement by Justice Miller in the *Slaughter-House Cases* (1873) 16 Wall. 36, 77, 21 L.Ed. 394: "Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

In *Toomer v. Witsell* (1948) 334 U.S. 385, 395-396, 68 S.Ct. 1156, 92 L.

Negroes might thus, despite threats, etc., avail themselves of these specific privileges, the state could withdraw all privileges, common or special.

§ 360. — — Economic Rights—The Conspiracy Theory of the 14th Amendment

As Taney had written in 1849 and 1859, Negroes were property and therefore had no rights under the Constitution; neither did they have any rights under the common law. In this sense, therefore, freeing them and giving them status would likewise free them of any inability to enter into economic and legal relationships. And this was especially so if, as state citizens, they could be entitled to whatever rights, or privileges and immunities, could be enjoyed by them under the 4th Article's Clause. It would therefore appear that, if the Negroes were denied economic rights, they could obtain them through federal judicial enforcement. However, what of the Black Codes, the Ku Klux Klan, and the physical and mental tortures inflicted upon the new citizens? In this fashion, as also in their political and personal rights, the Negroes now required assistance.⁴⁶

The aid to be given those whom the 13th Amendment had freed could, perhaps, have been directly and explicitly expressed

Ed. 1460, Chief Justice Vinson wrote: "The primary purpose of this clause, like the clauses between which it is located—those relating to full faith and credit and to interstate rendition of fugitives from justice—was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation. 'Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.' . . .

"In line with this underlying purpose, it was long ago decided that one of the privileges which the clause guarantees to citizens of

State A is that of doing business in State B on terms of substantial equality with the citizens of that State.

"Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures."

46. See the analysis and discussion by Justice Miller in the *Slaughter-House Cases*, *supra* note 45, at pp. 70-71.

and conferred but, as noted in § 359, "The framers of the Constitution were unwilling to use the word 'slaves'" ⁴⁷ So the framers of the 13th and 14th Amendments, as well as of the 15th, were equally unwilling to use the word "slave" or "Negro" (save in the 14th, § 4, where "slave" was necessary to be used), and even when almost specifically referring to them, as in the 13th, 14th, and 15th Amendments, used general language or euphemisms. In the Slaughter-House Cases of 1873 the majority felt that the "true meaning" of the Civil War Amendments was in "the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have even been suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." ⁴⁸

This narrow interpretation was challenged by a member of the congressional Joint Committee on Reconstruction (§ 357) which had prepared and proposed the 14th Amendment. In an 1882 argument before the Supreme Court Roscoe Conkling, who had twice refused a Justiceship and who not alone spoke as a participant but submitted records in support of his contentions, in effect contended that language designed for broader purposes had been used, i. e., to aid corporations and the business community.⁴⁹ How successful he was is illustrated by the fact that the Court accepted his views in a subsequent but companion case, although he did not appear, and now refused "to hear argument on the question whether the" 14th Amendment's Equal Protection Clause "applies to these corporations. We are all of opinion that it does." ⁵⁰ But does this broad view still remain a narrow one, in that only Negroes and corporations are to be included? "The State of Texas would have us hold that there are only two classes—white and Negro—within the contemplation of the Fourteenth Amendment. The decisions of this Court do not support that view." ⁵¹

47. Supra note 41, text keyed to note.

48. Slaughter-House Cases, supra note 45, at p. 71.

49. The argument was made in *San Mateo County v. Southern Pacific R. R. Co.* (1885) 116 U.S. 138, 6 S.Ct. 317, 29 L.Ed. 589. The official report does not disclose Conkling's appearance, but the unofficial report so does.

50. *Santa Clara County v. Southern Pacific R. R. Co.* (1886) 118 U.S. 394, 396, 6 S.Ct. 1132, 30 L.Ed. 118. The "conspiracy theory," that Conkling (and others) had subtly used the

unsuspecting Congressmen to foist their own views and desires upon the nation, is carefully examined and rejected by Graham, *The Conspiracy Theory of the Fourteenth Amendment*, 47 *Yale L.J.* 371 (1938), 48 *id.* 171 (1938), and Boudin, *Truth and Fiction About the Fourteenth Amendment*, 16 *N.Y.U. L.Rev.* 19 (1938); see also James, *The Framing of the Fourteenth Amendment*, 37 *Ill.Studies in Soc. Sciences*, Chaps. 4-7 (1956).

51. *Hernandez v. Texas* (1954) 347 U.S. 475, 477-478, 74 S.Ct. 667, 98 L.Ed. 866.

§ 361. The 14th Amendment—In General

The historic background of the 14th Amendment discloses that not alone was the 13th Amendment unable to give the Negroes the economic and civil benefits envisaged by Congress, but also that the new Amendment itself could not provide them voting rights. In other words, the 1868 Amendment was not designed or expected to provide a broad-all-inclusive righting of the wrongs being suffered by the freed Negroes; and in this view the provisions of the 14th Amendment are to be correlated to the particular evils of the period. This does not involve a return to the Slaughter-House's "true meaning" (§ 360), but it does permit an understanding of the future interpretations to be accorded to the clauses found in the 14th Amendment. We concentrate here upon an analysis of its first section, particularly the first sentence, and briefly present the three major clauses which are then intensively examined in the following Chapters. The entirety of the first section follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

§ 362. — In Particular—Section 1—Sentence 1

The first sentence should be split into two parts. The first involves the definition of federal citizenship, while the second concerns itself with state citizenship; the sentence may be diagrammed as follows:

Humans (born or naturalized in the U. S.)	+	Jurisdiction (subject to, of U. S.)	=	Federal citizenship
Federal citizenship	+	Residence (in a state)	=	State citizenship

In the Slaughter-House Cases the majority felt that "No such definition was previously found in the Constitution, nor had any attempt been made to define it by act of Congress."⁵² They refer-

52. Supra note 45, at p. 72. Justice Miller was not exactly correct in this, for the Civil Rights Act of 1866, in its opening section (14 Stat. 27), stated that "All persons born in the United States and not

subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States" See also note 38, supra.

red to "much discussion" concerning the definition of citizenship, and then wrote:

"The first observation we have to make on this clause is that it puts at rest both the questions which we have stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to their citizenship of a particular state, and it overturns the *Dred Scott* decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls and citizens or subjects of foreign states born within the United States.

"The next observation is more important in view of the arguments of counsel in the present case. It is that the distinction between citizenship of the United States and citizenship of a state is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a state, but an important element is necessary to convert the former into the latter. He must reside within the state to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

"It is quite clear, then, that there is a citizenship of the United States and a citizenship of a state, which are distinct from each other and which depend upon different characteristics or circumstances in the individual."⁵³

Two years later the same bench, with but a change in the Chief Justice, unanimously reaffirmed the law that all children born in the United States of citizen parents were themselves citi-

53. At pp. 73-75. In Justice Swayne's dissent he writes: "A citizen of a state is ipso facto a citizen of the United States. No one can be the former without being also the latter; but the latter, by losing his residence in one state without acquiring it in another, although he continues to be the latter, ceases for the time to be the former." See also *United States v. Hall* (1871) Fed.Cas. #15,282, 26 Fed.Cas. 79, 81, a criminal indictment brought under the Enforcement Act of 1870 the following year, where two nisi prius circuit judges felt that the new "amendment has a vital bearing upon the question" in the case. They quot-

ed the first sentence and said: "By the original constitution citizenship in the United States was a consequence of citizenship in a state. By this clause this order of things is reversed. Citizenship in the United States is defined; it is made independent of citizenship in a state, and citizenship in a state is a result of citizenship in the United States." In *Colgate v. Harvey* (1935) 296 U.S. 404, 427, fn. 3, 56 S.Ct. 252, 80 L.Ed. 299, the *Hall* case is quoted in this regard. The *Colgate's* holding was reversed in *Madden v. Kentucky* (1940) 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590.

zens; and in 1898 a majority of a new bench held that all children born in the United States, even to aliens temporarily here, unless exempt from the federal jurisdiction, were also federal citizens, and this regardless of race, color, nationality, etc.⁵⁴ In effect, this made federal citizenship, even though not so created by the first sentence, a "paramount and dominant" one over state citizenship, "instead of being subordinate and derivative,"⁵⁵ and the federal government thus has power to create such a national citizenship either by a particular naturalization law or a general and all-inclusive one.⁵⁶

§ 363. — — — Sentence 2—In General

The second sentence is a prohibition upon the states, for it opens with the words "No State." The fifth section, however, as well as the second section of the 13th Amendment, authorizes Congress to enact appropriate legislation, and these are therefore a grant of powers to effectuate the provisions of these Amendments. These Amendments "were intended to be, what they really are, limitations of the powers of the States [and of the United States], and enlargements of the power of Congress. They are, to some extent, declaratory of rights, and though in form prohibitions, they imply immunities, such as may be protected by congressional legislation."⁵⁷ This legislation, however, had to be "not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce," and which by the 14th

54. *Minor v. Happersett* (1874) 21 Wall. 162, 166-168, 22 L.Ed. 627, and *United States v. Wong Kim Ark* (1898) 169 U.S. 649, 674-675, 682, 18 S.Ct. 456, 42 L.Ed. 890. (In the dissenting opinion there is an analysis of the "subject to the jurisdiction" clause and its interpretation.)

55. *Arver v. United States* (1918) 245 U.S. 366, 389, 38 S.Ct. 159, 62 L.Ed. 349.

56. See, e. g., 8 U.S.C.A. §§ 601-602, 722, making citizens of Puerto Rico, as well as of the Virgin Islands, citizens of the United States. See also § 250 on this.

57. *Ex parte Virginia* (1880) 100 U.S. 339, 345, 25 L.Ed. 676. At pp. 346, 347 the court also wrote: "The prohibitions of the 14th Amendment are directed to the States, and they are to a degree restrictions of state power. It is these which Congress is empowered to enforce, and to en-

force against state action, however put forth, whether that action be executive, legislative or judicial. Such enforcement is no invasion of state sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact." "The constitutional provision therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State."

Amendment they no longer can.⁵⁸ Thus federal legislation under the 14th Amendment, striking at purely private discrimination, was denounced as not being within the constitutional powers of the national legislature, though analogous federal legislation under the 13th and 15th Amendments is upheld.⁵⁹

§ 364. — — — — The Three Clauses

The three great limitations upon the states, found in the second sentence of the first section of the 14th Amendment, are the Privileges and Immunities Clause, the Due Process Clause, and the Equal Protection Clause. They are discussed in the four Chapters which follow.

58. Civil Rights Cases, *supra* note 27, at p. 14; see also note 30, *supra*.

59. See the Civil Rights Cases, *supra* note 27, so denouncing such federal legislation directed against private discrimination, and §§ 357–358, as well as *Ex parte Yarbrough*, *supra* note 32, upholding an indictment under a federal statute against a private person for a violation of the 15th Amendment's voting rights, and *United States v. Harris*, *supra* note 34, at p. 640, and the Civil Rights Cases, *supra*

note 27, where, speaking of the 13th Amendment and saying it is different from the 14th, the court holds that "the powers of Congress under them are different." At p. 23. And under the 13th Amendment, "legislation may be primary and direct in its character" At p. 20. See also *Clyatt v. United States* (1905) 197 U.S. 207, 218, 25 S.Ct. 429, 49 L.Ed. 726, and *United States v. Gaskin* (1944) 320 U.S. 527, 529, 64 S.Ct. 318, 88 L.Ed. 287.

Chapter XVII

THE FEDERAL PRIVILEGES AND IMMUNITIES CLAUSE

§ 370. The Two Privileges and Immunities—Analysis—Dis-similarity of Citizens Affected

The 14th P & I Clause is not to be confused with the 4th P & I Clause. In § 80 the latter clause was disclosed to be a grant to "The Citizens of each State," so that it concerns state citizens, whereas the 14th's Clause speaks of the "citizens of the United States," and thus applies to federal citizens. The reason behind this grant of privileges and immunities to federal citizens has been disclosed in the preceding Chapter, and we should note that such background analysis did not disclose the need for *additional* privileges and immunities, merely the *ineffectiveness of the existing* ones which required application and effectuation rather than re-definition and elaboration.

In the first sentence of the first section, therefore, a federal citizenship was not created but defined unequivocally, so that no state would be able to question this fact. Now, in the second sentence, these federal citizens were granted privileges and immunities, whereas in the 4th Article it is state citizens who are entitled to them. So, in the Slaughter-House Cases of 1873, the majority felt that in the first sentence of § 1 of the 14th Amendment "there is [defined] a citizenship of the United States and a citizenship of a state, which are distinct from each other and . . . [the second sentence] speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several states." ¹

§ 371. — — Similarity of the Privileges and Immunities

The examination of the 4th and 14th P's & I's, in the light of Chapter XVI, also discloses that, before the adoption of the first sentence of the first section of the 14th Amendment, a separate and distinct federal and a state citizenship existed; that the former was, in effect, subordinated to the latter; and that the 4th Article spoke of the citizens "of" each state, who were entitled to

1. Slaughter-House Cases (1873) 16 Wall. 36, 74, 21 L.Ed. 394, also saying that "it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter,

whatever they may be, are not intended to have any additional protection by this paragraph of the Amendment." See, however, discussion in § 374.

the privileges and immunities "of" citizens "in" the several states. Since the second "of" was not qualified so as to say "of state Citizens," or "of federal Citizens," the Article thus could have referred to both federal and state citizens, and to the privileges and immunities to which they were entitled; that is, the 4th Article could well have read, or been interpreted to read, The Citizens of each State shall be entitled to all the Privileges and Immunities to which other federal and State Citizens are entitled in the several States in which they reside. Or this meaning could well have been engrafted onto the Constitution's P & I Clause in the light of the Articles of Confederation, where its Art. IV spoke of "the people of the different states in this Union" and then limited to "the free inhabitants of each of these states" the grant, i. e., they "shall be entitled to all privileges and immunities of free citizens in the several states" Since "free inhabitants" could include both federal and state citizens, and "free citizens" did not limit itself to state citizens, and since this earlier Clause had been the prototype for the later one, Marshall's or Taney's court well could have announced that the 1789 clause would be so construed. And this could also have included an interpretation that "all privileges and immunities of free citizens in the several states" meant all federal and/or state privileges and immunities of free federal and/or state citizens who resided in the several states.² If so done, then obviously the freed Negroes in the post-Civil War period would have been able, as federal citizens, to claim their (federal) rights to these (federal) privileges and immunities, and under the Necessary and Proper Clause (§§ 162, 98) the Congress might well have legislated to enforce these privileges and immunities of (federal) citizens.

This analysis is not an exercise in semantics or in statutory or constitutional interpretation; for if the construction above suggested were either rejected or not adopted, and the freed Negroes would not be able to sue or obtain their privileges and immunities, then it would appear that it would be not because of any meaning to be attached to the privileges and immunities them-

2. A glance at the 14th P & I Clause discloses that the prohibition is upon the states not to abridge the privileges and immunities "of citizens of the United States," so that those spoken of here are not limited or qualified as to federal or state ones. See, e. g., Justice Bradley's dissenting language in the Slaughter-House Cases, *supra* note 1, at p. 117: "It is pertinent to observe that both the clause of the Con-

stitution referred to, and Justice [Bushrod] Washington in his comment [in *Corfield v. Coryell*] on it, speak of the privileges and immunities of citizens in a state, not citizens of a state. It is the privileges and immunities of citizens, that is, of citizens as such, that are to be accorded to citizens of other states when they are found in any state"

selves, but because the southern states prevented their enforcement or effectuation. The point is that the privileges and immunities *per se* were not involved but, rather, their application. The Congress would thus strike against the methods, or practices whereby the states prevented the entitlement of these privileges and immunities, and since the existing ones were not felt to be deficient in scope or interpretation, would leave them alone; at least, from any method of interpretation applied, some form of additional or explanatory phrase should have been added if there had been dissatisfaction with the substantive definition of the existing privileges and immunities, e. g., the inclusion of an Equal Protection Clause. Our conclusion is that by the 14th P & I Clause the Congress did three things: first, it may have left the substantive definition alone;³ second, it extended these seemingly unchanged privileges and immunities to federal, as well as state, citizens; and, third, it provided for their procedural enforcement as against the states by the fifth section which granted Congress "power to enforce, by appropriate legislation," the several provisions.

§ 372. — — Similarity of the States So Limited

The 14th P & I Clause may thus apply the same privileges and immunities on behalf of and affect different citizens, but whom does it limit? That is, different citizens must look to whom for their same privileges and immunities? The answer is the states, and that a state must accord the same privileges and immunities (as these are so interpreted to be alike) to different citizens (see, e. g., § 359). If we look at the two clauses we see that the 4th entitles the state citizens "to all the Privileges and Immunities of Citizens in the several States," whereas the 14th prevents the states from making or enforcing "any law which shall abridge the privileges or immunities of" federal citizens. The first appears to be a positive, and the second a negative, grant of privileges and immunities, but this is of no great moment;⁴ neither is the use of

3. This is not the view taken by numerous cases, e. g., *Snowden v. Hughes* (1944) 321 U.S. 1, 11, 64 S.Ct. 397, 88 L.Ed. 497, when Chief Justice Stone wrote, citations omitted: "Where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights. But the necessity of a showing of purposeful discrimination is no less in a case involving political rights than in any other. It was not intended by the Fourteenth Amendment and the Civil Rights Acts that all matters for-

merly within the exclusive cognizance of the states should become matters of national concern.

4. See, however, the dissenting opinion of Justice Field in *O'Neil v. Vermont* (1892) 144 U.S. 323, 363, 12 S.Ct. 693, 36 L.Ed. 450: "The freedmen thus became citizens of the United States and entitled in the future to all the privileges and immunities of such citizens. But owing to previous legislation many of those privileges and immunities, if that legislation was allowed to stand, would be abridged; therefore, in the same Amendment by

the conjunctive in the 4th, and the disjunctive in the 14th; of greater importance is the fact that both clauses are requirements of or limitations upon the states, and that it is the states only which are so acted upon. In other words, the states must give to state citizens (4th) and to federal citizens (14th) certain privileges and immunities, and the federal government nowhere in the Constitution or the amendments is so limited, required, or acted upon. Furthermore, "a state cannot under the Fourteenth Amendment, abridge the privileges of a citizen of the United States, albeit he is at the same time a resident of the state which undertakes to do so." ⁵

§ 373. The Definition of Privileges and Immunities ⁶

In a case decided four months before the 14th Amendment was adopted all Justices denounced a state tax upon persons travelling through or out of the state; one Justice felt "the judgment should have been placed exclusively upon" the ground that the tax was "inconsistent with the power conferred upon Congress to regulate commerce among the several states," but the rest of the High Court felt "The question [to be decided is] of the taxing power of the states, as its exercise has affected the functions of the Federal government" These functions, it was felt, could not be exercised unless the "government has a right to call to this point [Washington] any or all of its citizens to aid in its service, as members of the Congress, of the courts, of the Executive Departments, and to fill all its other offices" and is therefore "entitled to bring them" wherever needed. "But," continued the opinion, "if the government has these rights on her own account, the citizen [i. e., "its citizens," or federal citizens] also has correlative rights. He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions, he has a right to free access to its sea-ports, . . . to the sub-treasuries, the land offices, the revenue offices, and the court of justice in the several states" ⁷ In effect, this enumerated for federal citizens

which they were made citizens, it was ordained that 'no State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States,' thus nullifying existing legislation of that character, and prohibiting its enactment in the future."

5. *Colgate v. Harvey* (1935) 296 U.S. 404, 428, 56 S.Ct. 252, 80 L.Ed. 299, citing cases. The holding was over-

ruled in *Madden v. Kentucky* (1940) 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590, but not the quotation.

6. The courts have consistently refused to define the meanings of the 4th or 14th P & I Clauses (see, e. g., § 378, *infra*). What follows therefore is in no sense limitation by enumeration.

7. *Crandall v. Nevada* (1868) 6 Wall. 35, 49, 44, 18 L.Ed. 745.

their federal privileges and immunities, and grouped them into those involved with the federal functionings, those having to do with travel throughout the country, those having to do with commerce and business, and those having to do with obtaining justice. In a sense, the Articles of Confederation, in Art. IV, enumerated these same principles for it spoke of "free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce" as those enjoyed by the other citizens. The Civil Rights Act of 1866, in its § 1, granted its defined federal citizens "the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens"

There were thus three sources available for a definition of privileges and immunities, regardless of whether these were federal or state, and in 1869 Justice Field wrote that the 4th P & I Clause relieves citizens "from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws."⁸ And five years after the adoption of the 14th Amendment, in the first case construing its clauses, the court presented an interpretation of privileges and immunities which, basically, followed precedents. For Justice Miller quoted the Articles of Confederation, as well as the Constitution's 4th Article, and said, "There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each." He next quoted the definition given in an 1823 decision on the 4th P & I Clause, which confined these "to those privileges and immunities which are fundamental" and which may "be comprehended under the following general heads: to acquire and possess property of every kind, and to pursue and obtain happiness and safety;" then he pointed out that but two years before this same court had "adopted in the main" this definition;⁹ he then quoted from Justice Field's 1869 opin-

8. *Paul v. Virginia* (1869) 8 Wall. 168, 180, 19 L.Ed. 357.

9. *Slaughter-House Cases*, supra note 1, at pp. 75 and 76, quoting from *Corfield v. Coryell* (E.D.Pa.1823) 4 Wash.C.C. 371, Fed.Cas.No.3,230, 6 Fed.Cas. 546, and citing *Ward v. Maryland* (1871) 12 Wall. 481, 20

L.Ed. 449. However, Justice Miller's reference to this last case is somewhat erroneous, for the opinion of Justice Clifford there did not refer to the *Corfield* case, cited *Paul v. Virginia*, supra note 8, for a different matter, and cited Cool-ey's treatise and *Brown v. Mary-*

ion; and finally he gave it as his view, in the form of rhetorical questions which in effect he answered no:

"Was it the purpose of the 14th Amendment, by the simple declaration that no state should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the states to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the states?"¹⁰

In effect, asked the Justice, are we to restrict the 14th P & I Clause to those items which in the past were felt to be "in the main" within the 4th P & I Clause? Or are we to go whole hog and now bring in many others, for example, the Bill of Rights of the federal Constitution (see § 378)? These questions were answered yes and no, respectively, for later decisions, speaking of this case, say that "it gave much less effect to the Fourteenth Amendment than some of the public men active in framing it intended [§ 360], and disappointed others This part at least of the Slaughter-House Cases has been steadily adhered to by this court, And so it was held that the right of peaceable assembly" for general purposes was not so protected.¹¹ However, "among the rights and privileges of National citizenship recognized by this court are the right to pass freely from State to State; the right to petition Congress for a redress of grievances; the right to vote for National officers; the right to enter the public lands; the right to be protected against violence while in the lawful custody of a United States marshal; and the right to inform the United States authorities of violation of its laws."¹²

land (1827) 12 Wheat. 419, 6 L.Ed. 678 at the end of a paragraph defining the Clause. He felt the rights protected were of travel, business, to possess and hold property, sue, "and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens." P. 430.

10. Slaughter-House Cases, *supra* note 1, at p. 77. In 1884 Justice Field "answered" this argument in Butchers' Union Slaughter-House and Live Stock Landing Company v. Crescent City Live Stock Landing and Slaughter-House Company (1884) 111 U.S. 746, 754-755, 4 S.Ct. 652, 28 L.Ed. 585; and Justice Bradley, with whom Harlan and Woods concurred, also wrote in ex-

tenso concerning his definition of the privileges and immunities of citizens under the Clause (pp. 764-765), and felt that the "phrase has a broader meaning" than as limited in the Slaughter-House Cases to the one given in *Corfield v. Coryell* to the 4th Article's P & I Clause. (at p. 764)

11. *Twining v. New Jersey* (1908) 211 U.S. 78, 96-97, 21 S.Ct. 14, 53 L.Ed. 97, citing *United States v. Cruikshank* (1876) 92 U.S. 542, 551, 23 L.Ed. 588.

12. The *Twining* case, *supra* note 11, at p. 97, citations omitted. See also *Colgate v. Harvey*, *supra* note 5, at p. 433: "It follows from what has been said that when a citizen of

Other privileges and immunities may be included, as the court finds it advisable, e. g., the right to carry on interstate commerce, or they may not be so included, e. g., the right to vote, for otherwise the 15th Amendment would have been unnecessary.¹³

§ 374. — Inapplicability of the 4th Article's "Common Property" Exception

Under the 4th P & I Clause it was early held that a state could refuse a permit to non-citizens for, or refuse to grant them equality of treatment in, the gathering of oysters, the reason being that "in regulating the use of the common property of the citizens of such state, the legislature is [not] bound to extend to the citizens of all the other states the same advantages as are secured to their own citizens."¹⁴ A different holding occurred in 1948, pri-

the United States residing in Vermont goes into New Hampshire, he does not enter foreign territory, but passes from one field into another field of the same national domain. When he trades, buys, or sells, contracts or negotiates across the state line, when he loans money, or takes out insurance in New Hampshire—whether in doing so he remains in Vermont or not—he exercises rights of national citizenship which the law of neither state can abridge without coming into conflict with the supreme authority of the federal Constitution." This approach was, in effect, an adoption of Justice Field's dissenting opinion in the Slaughter-House Cases, and was challenged by Justice Stone in a dissenting opinion, concurred in by Brandeis and Cardozo. Five years later the *Colgate* decision was overruled, see note 5 *supra*. In Justice Black's dissenting opinion in *Adamson v. California* (1947) 332 U.S. 46, 78, 67 S.Ct. 1672, 91 L.Ed. 1093, he states (citations omitted): "Later, but prior to the *Twining* Case, this Court decided that the following were not 'privileges or immunities' of national citizenship, so as to make them immune against state invasion: the Eighth Amendment's prohibition against cruel and unusual punishment; the Seventh Amendment's guarantee of a jury trial in civil cases; the Second Amendment's right of the people to keep and bear Arms . . .; the Fifth and Sixth Amendments' requirements for indictment in capital or

other infamous crimes, and for trial by jury in criminal prosecutions. While it can be argued that these cases implied that no one of the provisions of the Bill of Rights was made applicable to the states as attributes of national citizenship, no one of them expressly so decided."

As to the right to travel, see also *New York v. O'Neill* (1959) 359 U.S. 1, 79 S.Ct. 564, 3 L.Ed.2d 585, upholding the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings. There a New York judge requested a Florida judge to place an Illinois citizen, who was attending a convention in Miami, in New York's custody so as to bring him north and have him testify in a grand jury proceeding. Seven Justices approved the Florida cooperation and rejected a plea that either the 4th or 14th P & I Clause prevented this as a restriction on the right to travel; the dissenters gave a summary of decisions and held otherwise. Both opinions provide excellent digests of background and cases.

13. Respectively, *Crutcher v. Kentucky* (1891) 141 U.S. 47, 57, 11 S.Ct. 851, 35 L.Ed. 649, and *Minor v. Happersett* (1875) 21 Wall. 162, 177-178, 22 L.Ed. 627, and for a listing of other exclusions, see Corwin, ed., *The Constitution of the United States* (1953) pp. 969-971.

14. *Corfield v. Coryell*, *supra* note 9, at p. 552. See also *Geer v. Connecticut* (1896) 161 U.S. 519, 16

marily because of the Commerce Clause (§ 376), but also because the fish there were free-swimming and not common property.¹⁵ Is this bifurcated approach to be adopted for the 14th P & I Clause? There are two answers which negate such a possibility. First, there is a difference in language which is significant, and, second, there is a difference in theory and in application.

The 4th speaks of the privileges and immunities "of Citizens" who are in the several states, whereas the 14th speaks "of citizens of the United States," and in § 371 we have analyzed this difference. Despite the possibility of construing the 4th's terms as there suggested, the courts have decided otherwise. Thus, in permitting states to favor their own citizens, at least insofar as their "common property" is involved, the judiciary has translated "of Citizens" into "of state Citizens;" and since there are today fifty varieties of state courts, there are possibly fifty varieties of legislative and judicial views, albeit subject to the supervisory power of the Supreme Court. But in considering the 14th's terms this result cannot occur, for only one type of "citizens of the United States" is possible. In theory and in application the same result is reached, because since only one variety of federal citizenship can so exist, then all are equally entitled to the same federal privileges and immunities, and if there is any common federal property all are equally entitled to it; so that unless some other basis for discriminatory treatment is found, the federal P & I Clause is incapable of adopting the "common property" exception found in applying the state P & I Clause.

§ 375. — Inapplicability to Corporations and Aliens

Although corporations could not claim the benefits of the 4th P & I Clause,¹⁶ could they come within that of the 14th Amendment? The answer is no, so that the two clauses are so harmoniously construed.¹⁷ Insofar as aliens are concerned, the 4th and

S.Ct. 600, 40 L.Ed. 793 (restriction on killing of game upheld); *Hudson County Water Co. v. McCarter* (1903) 209 U.S. 349, 28 S.Ct. 529, 52 L.Ed. 828 (restriction on diversion of water upheld); *Pennsylvania v. West Virginia* (1923) 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117 (preference of natural gas denounced); *LaTourette v. McMaster* (1919) 248 U.S. 465, 39 S.Ct. 160, 63 L.Ed. 362 (restrictions on insurance agents upheld).

15. See note 19, *infra*.

16. *Paul v. Virginia*, *supra* note 8, at pp. 177-179; see also *Grosjean v. American Press Co.* (1936) 297

U.S. 233, 244, 56 S.Ct. 444, 80 L.Ed. 660, *Asbury Hospital v. Cass County N. D.* (1945) 326 U.S. 207, 66 S.Ct. 61, 90 L.Ed. 6, and *Hemphill v. Orloff* (1928) 277 U.S. 537, 48 S.Ct. 577, 72 L.Ed. 978 (a Massachusetts trust held to be a corporation).

17. *Orient Ins. Co. v. Daggs* (1899) 172 U.S. 557, 560-561, 19 S.Ct. 281, 43 L.Ed. 552; see also *Hague v. C. I. O.* (1939) 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423, and *Western Turf Ass'n v. Greenberg* (1907) 204 U.S. 359, 27 S.Ct. 384, 51 L.Ed. 520.

14th clauses are self-evident in their non-inclusion of aliens and all others except either state or federal citizens.

§ 376. — The Commerce Clause

The judicial reluctance to engage in a general listing or enumeration of privileges and immunities, except as presented and this on a case-by-case basis, permits claims to be made under several clauses. More importantly the interpretations already accorded have, for state and federal citizens, given them the right to travel within the United States; it will be noted, however, that this travel has been somehow qualified or described, that is, it was necessary for the federal government's functions that it have the power to call citizens to it, or that citizens be able to go to Washington, or to courts, or engage in interstate commerce.

An unequivocal holding that a citizen could constitutionally travel anywhere he chose, for any or no reason, and settle where he desired, had not been made when, in 1941, the Supreme Court had the *Oakie Case* before it. There a California statute was designed to prevent migrating indigents from other states from removing into it, and the entire bench concurred in voiding the law. The Justices split 5-4, however, on why; the majority felt the Commerce Clause was applicable, and the minority (in two opinions) felt that the right to move freely within the nation was a privilege of federal citizenship. Justice Jackson desired the court to "hold squarely that it is a privilege of citizenship of the United States, protected from state abridgement, to enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof. If national citizenship means less than this, it means nothing."¹⁸ Similarly did the court rely upon the Commerce Clause, in preference to the privileges and immunities (there of the 4th), in denouncing South Carolina statutes which sought to govern commercial shrimp fishing within the three-mile maritime belt off its coast, for the free-swimming fish could not be said to be "owned" by the state so as to be subject to its control.¹⁹

It is suggested that in the *Oakie Case* the majority's holding may be broader, i. e., cover more people, than is the minority's desire, for the 14th P & I Clause applies only to federal citizens, and does not permit those not such to seek redress; the Commerce Clause, however, embraces all, citizens and aliens, and this permits many others to be protected against state barriers.

18. *Edwards v. California* (1941) 314 U.S. 160, 183, 62 S.Ct. 164, 86 L.Ed.

119. See also Justice Douglas' opinion, at pp. 178-181, for aspects

of the right to travel, and definitions of the clause.

19. *Toomer v. Witsell* (1948) 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460.

§ 377. The Bill of Rights—As Rights of Federal Citizens

The federal Bill of Rights has been somewhat examined in Chapter XV, and in § 327 we quoted Madison's view that one of his proposed, but rejected, amendments was "the most valuable of the whole list." That amendment spoke of the "equal rights" of the people which were not to be infringed by the states, and this, among other things, gave rise to efforts to have the entirety of the ratified Bill of Rights limit the states. These efforts were direct and indirect, in a sense; direct, in asserting that the Bill of Rights without more (save for the 1st and 7th Amendments), applied directly and immediately to the states as limitations; indirect, in claiming that the concepts of the Bill of Rights should be judicially embodied within the broad clauses of the 14th Amendment and thereby made effective against the states; and both of these efforts are examined in § 378. There is another aspect of this problem which may be first considered, namely, the general meaning of the rights of federal citizens, and how these relate to the Bill of Rights.

The Bill of Rights specifically mentions "Congress" and the "United States" in the first and seventh Amendments, respectively; in the other six (of the first eight) we find the term "right" mentioned three times: in the 2d "the right of the people to keep and bear Arms shall not be infringed;" the 4th, "The right of the people to be secure in their persons," etc.; and the 6th, "the accused shall enjoy the right" to several items. With respect to the 3d, 5th, and 8th Amendments, the term "right" is not found, but negative restrictions are there found, not specifying either government. Thus "rights" are given twice to the "people" and once to the "accused" directly, and indirectly three times. The 9th Amendment then states that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Since the 1789 Constitution does not contain any direct rights so enumerated, this must have reference to the indirect rights obtained through the limitations imposed upon the federal and state governments in Art. I, §§ 9 and 10, or to the Bill of Rights themselves, or to both, else the 9th Amendment doesn't make sense. And since it is the "people" who have been given these rights, or for whom they have been enumerated, it is not necessary that one be a citizen, federal or state, to claim them.²⁰

20. See, however, the dissenting views of Justice Field in *O'Neil v. Vermont* (1892) 144 U.S. 323, 363, 12 S.Ct. 693, 36 L.Ed. 450, that "so far as they [the Bill of Rights] declare or recognize the rights of persons, they are rights belonging to them as citizens of the United

States under the Constitution; and the 14th Amendment, as to all such rights, places a limit upon state power by ordaining that no state shall make or enforce any law which shall abridge them." First, the Justice speaks of "persons" whereas the Amendments

Nevertheless, assuming that non-citizens and citizens, federal and state, could seek these rights, how could these prove insufficient? If the rights of the "people" (Bill of Rights) or "of Citizens" (4th P & I Clause) are compared, then it may be noted that the definition of the latter is somewhat more extravagant and fulsome than is that of the former. For in § 373 we have seen how the early approach to state privileges and immunities was to call them "fundamental," and define this term as including various items, e. g., the right to travel to the capital; but since the Bill of Rights nowhere contains this term, or a good many of the others so given, then the privileges and immunities are not so limited but are broader through judicial definition.²¹

§ 378. — Rejected as State Limitations Via the 14th Privileges and Immunities Clause

The preceding section has disclosed several variations of the question which now is to be answered, is the Bill of Rights a limitation upon the states by the so-called "absorption" or "adoption" or "osmosis" process? In 1870 the Enforcement Act became law, and within a year John Hall and William Pettigrew were indicted because they "did unlawfully and feloniously band and conspire together, with intent to injure, oppress, and threaten and intimidate William Miller and others" from peaceably assembling and speaking, in violation of the statute (see § 358 on Act). Hall and Pettigrew demurred, claiming these last were not rights or privileges which could be secured in this fashion. The two lower Judges overruled the demurrer, feeling the 14th P & I Clause (mentioning casually the Equal Protection Clause) was a sufficient basis for the federal use of its powers under § 5, and then wrote: "Among these [fundamental rights of the P & I Clause] we are safe in including those which in the constitution are expressly secured to the people, either as against the action of the federal or state governments. Included in these are the right of freedom of speech, and the right peaceably to assemble." And so, they concluded, "We think, therefore, that the right of freedom of speech, and the other rights enumerated in the first eight articles of amendment . . . are the privileges and immunities of citizens of the United States, that they are secured by the constitution, that congress has the power to protect them by appropriate legislation."²²

speaking directly of "people;" although in the 5th Amendment only "person" is found, in the 6th it is only "accused," and in the 8th neither is mentioned; and, second, the Justice leaps from "persons" to federal citizens, although this is a narrowing of the term.

21. In general, see the dissenting language of Justice Bradley in the Slaughter-House Cases, *supra* note 1, at pp. 118-120, and that of Justice Swayne, at pp. 126-127.

22. *United States v. Hall* (1871) Fed. Cas.No.15,282, 26 Fed.Cas. 79, 81,

Was this a correct interpretation? Louisiana, by an act of 1869, effective the following year, granted a monopoly to and incorporated the Crescent City Live Stock Landing & Slaughter House Company, whereupon The Live Stock Dealers' & Butchers' Association of New Orleans sought to invalidate the legislation, and several other suits and counter-suits were filed, all coming together under the title, *The Slaughter-House Cases*.²³ The briefs of counsel make no mention of the 1871 Hall indictment, nor do the several opinions cite it; however, the reasoning of Justice Miller, for the majority, as well as his conclusion, was to the direct contrary of that in the Hall Case. As quoted in § 373, he first asked two rhetorical questions, in effect answering them no, pointing up his view that the 14th P & I Clause, as so desired to be interpreted, meant a transfer of the protection of privileges and immunities from the states to the federal government, and constituted the latter the protector of "the entire domain of civil rights heretofore belonging exclusively to the states." He then wrote:

"All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by state legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the states, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgments of the supreme court of Louisiana in these cases would constitute this court a perpetual censor upon all legislation of the states, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this Amendment. The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the state governments by subjecting them to the control of Congress,

82. The reasoning of the court is found at p. 81.

23. A preliminary procedural matter was decided by the Supreme Court in December of 1870, *Slaughter-House Cases* (1870) 10 Wall. 273, 19 L.Ed. 915, and eight Justices thereafter heard argument on the mer-

its in January of 1872; an equal division occurring, the case was held until argued before a full bench of nine in February of 1873, with the decision being handed down in April of that year. 16 Wall. 36, 21 L.Ed. 394.

in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the state and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

"We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislature of the states, which ratified them."²⁴

Justice Field's dissenting views were not clear cut, but in 1892 he was still upon the bench. In that year a majority of the court dismissed a writ of error to review a Vermont conviction, feeling that the state court "decided the case before us upon a ground broad enough to maintain its judgment without considering any Federal question,"²⁵ but nevertheless stating, "Moreover, as a Federal question, it has always been ruled that the 8th Amendment to the Constitution of the United States does not apply to the states."²⁶ Field's dissent, as well as that of Harlan, was clear-cut in rejecting this *dictum*, but it is his reasoning which is our concern here. To reiterate, the choices we have set up are: to go whole hog and say that the Bill of Rights is a complete and direct limitation upon the states as well as the federal government; to reject completely and unequivocally this assertion and to hold, *per contra*, that the Bill of Rights is a limitation solely upon the federal government and in no manner, clause, or portion does it limit the states; to adopt an in-between position, and hold that some clauses are, and some are not, i. e., the 1st and 7th, because these refer specifically to the national government; or, finally, to say that the Bill of Rights embodies basic concepts of general applicability, and that while the first eight amendments may limit only the federal government, these broad concepts may also be found, all or some, in other clauses which limit the states, and thereby become dual-sovereign limitations. Justice Field adopted this last position:

"While therefore, the ten amendments as limitations on power, and, so far as they accomplish their purpose and find

24. 16 Wall. at pp. 77-78. Justice Field's dissent did not touch upon this question, save by exceedingly general language; Justice Bradley's dissent did, in effect, argue against this interpretation, and concluded to the contrary, at pp. 121-123; and Justice Swayne's dissent spoke around the question but it never struck home.

25. O'Neil v. Vermont, *supra* note 20, at p. 336; Justices Field and Har-

lan (Brewer concurring in the main with Harlan) separately disagreed, pointing to a commerce clause claim throughout.

26. *Ibid.*, at p. 332, citing *Pervear v. Massachusetts* (1867) 5 Wall. 475, 480, 18 L.Ed. 608. In that case Field did not object, or indicate any dissent, to a statement that the 8th Amendment "does not apply to state but to national legislation. *Barron v. Baltimore*, 7 Pet. 243."

fruition in such limitations, are applicable only to the Federal government and not to the states, yet so far as they declare or recognize the rights of persons, they are rights belonging to them as citizens of the United States under the Constitution; and the 14th Amendment, as to all such rights, places a limit upon state power by ordaining that no State shall make or enforce any law which shall abridge them.”²⁷

Justice Harlan had another opportunity, eight years later when Field had left the bench, to disagree with the majority which felt that “the privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments. . . .”²⁸ He now spoke of “the first ten Amendments,” and felt that “since the adoption of the Fourteenth Amendment those privileges and immunities are, in my opinion, also safeguarded against infringement by the states.”²⁹ And again, eight years later, in 1908 against a majority which now included Holmes,³⁰ the Justice argued particularly that the 5th Amendment’s immunity from self-incrimination came not only within the P & I Clause, but also within the 14th Due Process Clause,³¹ and generally, albeit vainly, that the privileges and immunities secured against federal action “in the

27. The O’Neil case, *supra* note 20, at p. 363. Justice Harlan, in his dissent, wrote: “I fully concur with Mr. Justice Field, that since the adoption of the 14th Amendment, no one of the fundamental rights of life, liberty, or property, recognized and guaranteed by the Constitution of the United States, can be denied or abridged by a State. . . . These rights are, principally, enumerated in the earlier amendments of the Constitution. . . . Among those rights is immunity from cruel and unusual punishments, secured by the 8th Amendment against Federal action, and by the 14th Amendment against denial or abridgement by the states.” At p. 370. This statement is slightly ambiguous; did the Justice mean that he agreed that the P & I Clause could so be used, or did he, by referring to “the fundamental rights of life, liberty, or property,” desire the Due Process Clause to be so used?

28. *Maxwell v. Dow* (1900) 176 U.S. 581, 597, 600, 20 S.Ct. 448, 44 L.Ed. 597. The majority, at pp. 591-600, discussed numerous prior decisions in this general area, which are not here elaborated upon.

29. *Ibid.*, at p. 617.

30. The majority opinion set up the argument of counsel as “the contention . . . that the safeguards of personal rights which are enumerated in the first eight” Amendments “are among the privileges and immunities of [federal] citizens This view has been, at different times expressed by justices of this court,” citing Field and Harlan in the O’Neil and Maxwell cases, “and was undoubtedly that entertained by some of those who framed the Amendment.” However, “the question is no longer open in this court.” *Twining v. New Jersey*, *supra* note 11, at p. 98. See also § 373, *supra*. The Twining opinion then discussed this at length, and also felt that the self-incrimination plea under the 5th Amendment did not become a state limitation under the 14th Due Process Clause.

31. *Ibid.*, at p. 117. He felt that if it came within the first clause then “it must also be regarded as wanting in” due process “when such state action substantially affects life, liberty, or property.”

original Amendments" were now secured against the states by the aforesaid two 14th clauses.³²

And so the matter rested until 1937, when *Palko v. Connecticut* came before the court. There the state permitted itself to take an appeal in a criminal case and the defendant challenged this as denying him not alone due process of law but also his privileges and immunities, both under the 14th Amendment. The bench then included Justices Brandeis, Stone, and Cardozo, as well as Justice Black, who had taken the oath on October 4th. The *Palko* case was argued November 12, and decided December 6th, the entire court save for Justice Butler agreeing in the opinion by Cardozo. The Justice spent almost nine pages disposing of the due process claim, and almost as an afterthought finally remarked that "There is argument in his [*Palko's*] behalf that the privileges and immunities clause of the Fourteenth Amendment as well as the due process clause has been flouted by the judgment. *Maxwell v. Dow* . . . gives all the answer that is necessary."³³ Ten years later Justice Frankfurter's concurrence was even more emphatic, for he stated that such wholesale-incorporation argument had been given the "fullest consideration" in the past and "rejected. . . . The notion that the" 14th P & I Clause "absorbed, as it is called, the provisions of the Bill of Rights . . . has never been given countenance by this Court."³⁴

That same year, about ten months later, a convicted defendant argued that a state law, permitting the court and counsel to comment upon his failure to explain or deny evidence against him, violated the 14th P & I Clause, and also its Due Process Clause. The majority opinion (of four, as Frankfurter concurred separately) assumed that this plea, if made in a federal criminal trial, would come under the 5th Self-Incrimination Clause, and then rejected any contention that it was thereby secured under the 14th P & I Clause. Justice Frankfurter felt the *Twining*

32. *Ibid.*, at p. 122. He then inquired what these privileges and immunities were, said "I will not attempt to enumerate" them all, but concluded that this 5th Self-Incrimination Clause, as well as the 1st Free Speech Clause, the 8th Cruel or Unusual Punishment Clause, the 5th Double Jeopardy Clause, and the 4th Searches and Seizures Clause, all came within such fundamental privileges and immunities definition. At pp. 124-125. And it was his conclusion that this 5th Self-Incrimination Clause also came within the 14th Due Process Clause. At p. 125.

33. (1937) 302 U.S. 319, 329, 58 S.Ct. 149, 82 L.Ed. 288.

34. *Louisiana ex rel. Francis v. Reswever* (1947) 329 U.S. 459, 467, 67 S.Ct. 374, 91 L.Ed. 422. Justices Burton, Douglas, Murphy, and Rutledge dissented, feeling that a mechanical switch failure in an electrocution could not be remedied by a second try, and this now was a cruel and unusual punishment which the 14th Due Process Clause forbade.

Case, "One of the outstanding opinions in the history of the Court" and which "shows the judicial process at its best," was a sufficient authority to uphold the statute, but, undoubtedly because of Justice Black's dissent, felt impelled to go into an evaluation of the prior cases to point out that the Due Process Clause had never been held to incorporate the Bill of Rights.³⁵ Justice Black, who ten years earlier had been upon the bench but a bare month when the Palko case was thrust upon him, had, by now, made his own "study of the historical events" and was now persuaded "that one of the chief objects that the provisions of the [14th] Amendment's first section, separately and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states." His intensive examination of the cases, and the bases for their decisions, showed how these opinions had built upon each other but "had not appraised the historical evidence on that subject," and that this was what the present court was doing. His historical evidence was summarized in an Appendix, and his conclusion (for three other Justices also) was that "I would follow what I believe was the original purpose of the Fourteenth Amendment—to extend to all the people of the nation the complete protection of the Bill of Rights."³⁶ In other words the desires of these dissenters stemmed from their overall view of the first section, and did not specify that the Bill of Rights, or its concepts, were to be included in the Privileges and Immunities Clause, in the Due Process one, or that of Equal Protection; rather, and without basing their evidence, their reasoning, or their conclusion upon one or two of these clauses, they would permit all to be so utilized.

This is the present status of the 14th P & J Clause, at least insofar as the Bill of Rights and its fundamental concepts are concerned.³⁷

35. *Adamson v. California* (1947) 332 U.S. 46, 59, 67 S.Ct. 1672, 91 L.Ed. 103.

36. *Ibid.*, at pp. 71–72, and 89; the Appendix is at pp. 92–123. Justice Douglas joined in this dissenting opinion. Justices Murphy and Rutledge were "in substantial agreement with the views of Mr. Justice Black," and they did "agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment." At p. 124.

37. See, nevertheless, the statement by Chief Justice Vinson in *Oyama v. California* (1948) 332 U.S. 633, 640, 48 S.Ct. 269, 92 L.Ed. 249, that

California's Alien Land Law "as applied in this case, deprives" Oyama of equal protection "and of his privileges as an American citizen." And also see *Wolf v. Colorado* (1949) 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782, upholding a state court which permitted the introduction of unlawfully seized evidence, although in *Mapp v. Ohio* (1961) 367 U.S. 643, 81 S.Ct. 1648, 6 L.Ed.2d 1081 this was overruled (see §§ 313 and 337). In the *Wolf* case Black concurred, although feeling the 4th's Search and Seizure Clause limited the states, because he thought the admission of the materials was a rule of evidence; the dissenters referred to the Black dissent in the *Adamson* case. How-

§ 379. — The Forgotten Clause

In § 376 the Oakie Case was mentioned, and two concurring opinions were referred to. In one of these Justice Jackson inveighed against the judicial course taken by the P & I Clause since 1868, referred to its general language, and then said:

“But the hope proclaimed in such generality soon shriveled in the process of judicial interpretation. For nearly three-quarters of a century this Court rejected every plea to the privileges and immunities clause. The judicial history of this clause and the very real difficulties in the way of its practical application to specific cases have been too well and recently reviewed to warrant repetition.

“While instances of valid ‘privileges or immunities’ must be but few, I am convinced that this is one. I do not ignore or belittle the difficulties of what has been characterized by this Court as an ‘almost forgotten’ clause. But the difficulty of the task does not excuse us from giving these general and abstract words whatever of specific content and concreteness they will bear as we mark out their application, case by case. That is the method of the common law, and it has been the method of this Court with other no less general statements in our fundamental law. This Court has not been timorous about giving concrete meaning to such obscure and vagrant phrases as ‘due process,’ ‘general welfare,’ ‘equal protection,’ or even ‘commerce among the several States.’ But it has always hesitated to give any real meaning to the privileges and immunities clause lest it improvidently give too much.”³⁸

To what extent this pessimistic view is correct is not here commented upon, but since a privilege and immunity right may also be found in other constitutional clauses,³⁹ it would appear that the Supreme Court leans toward protection of a federal citizen under one or more of these latter.

ever, the Oyama was an equal protection case, and Wolf was a due process one.

38. *Edwards v. California*, supra note 18, at pp. 182–183. The phrase, “almost forgotten,” is said to be “characterized by this court,” but this is in error, as it comes from the dissenting opinion of (later Chief) Justice Stone in *Colgate v. Harvey*, supra note 5, and since this was overruled in the *Madden* case, supra note 5, a question may arise whether the Stone dissent, with its “almost forgotten” conno-

tation, is now the approach to this Clause, if not the law.

39. See, e. g., *Oyama v. California*, supra note 37, at p. 433, speaking of the right of a federal citizen “resident in one state to contract in another” as being protected by the Due Process and the P & I Clauses “at the same time. . . . In such a case he may invoke either or both.” See also *Hague v. C. I. O.* (1939) 307 U.S. 496, 525, 532, 59 S.Ct. 954, 83 L.Ed. 1423, and *O’Neil v. Vermont*, supra note 20, at pp. 363–364.

§ 380. Enforcement

The fifth section of the 14th Amendment gives Congress power to enforce the first section by "appropriate legislation." Since the first section's prohibitions limit solely the states, i. e., "No State," then federal enforcement of the three clauses can be only upon state action or activity. Thus, "until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected," there can be no appropriate legislation enacted by Congress.⁴⁰ Of course legislation need not wait upon the deed, for

40. Civil Rights Cases (1883) 109 U.S. 3, 13, 3 S.Ct. 18, 27 L.Ed. 835, *United States v. Wheeler* (1920) 254 U.S. 281, 41 S.Ct. 133, 65 L.Ed. 270. (See also § 363) In the Civil Rights Cases Justice Bradley also wrote: "In this connection it is proper to state that civil rights, such as are guarantied by the Constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs or judicial or executive proceedings." "Of course, these remarks do not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the States" At pp. 17, 18. He also cited *United States v. Harris* (1883) 106 U.S. 629, 1 S.Ct. 601, 27 L.Ed. 290. Justice Harlan dissented at length, and vigorously. *Inter alia* he felt: (1) that a public conveyance, e. g., railroads, "are public highways, established by authority of the state for public use; . . . the function performed is that of the State" (p. 38); (2) "The same general observations which have been made as to railroads are applicable to inns," and that the innkeeper "is in the exercise of a quasi public employment." (pp. 40, 41); (3) and that "places of amusement, within the meaning of the Act of 1875, are such as are established and maintained under direct license of the law." (p. 41) Thus "such discrimination practiced by corporations and individuals in the exercise of their public or quasi public functions" may be prevented by Congress under the 13th Amend-

ment's § 2 (p. 43), and under the 14th Amendment's § 5 grant of affirmative powers to enforce, by federal legislation, an express prohibition upon the states. (p. 45) As to this second point the Justice examined the background of the Amendment for almost 20 pages, disclosing the bases for his well-reasoned conclusion.

For the current continuation of the majority views, see e. g., *Cooper v. Aaron* (1958) 358 U.S. 1, 4, 78 S.Ct. 1401, 3 L.Ed.2d 5, and *Burton v. Wilmington Parking Authority* (1961) 365 U.S. 715, 81 S.Ct. 856, 5 L.Ed.2d 40. In this latter case a restaurant, located within an off-street automobile parking building refused to serve a Negro. The building was owned and operated by the Authority, a state agency, which leased to the restaurant. The entire court remanded to ascertain if the state, through the Authority, did participate in the discrimination. Does this reflect the Harlan views of 1883? And to what extent does public aid to housing make this a state or federal type of activity? See, e. g., *Progress Development Corp. v. Mitchell* (7th Cir. 1961) 286 F.2d 222, and see, further, § 461, *infra*.

In 1884, the year after the Civil Rights Cases, *supra*, the Court held that Congress had power to indict conspirators who prevented a Negro from voting in a congressional election, but also wrote that while the 14th Amendment did not denounce private invasions of private rights, "it is quite a different matter when Congress undertakes to protect the citizen in the exercise of rights conferred by the Constitution of the United States essential to the healthy organization

this might perhaps involve an *ex post facto* law, or a bill of attainder; Congress may thus make it a crime, for such legislation is "appropriate," if a state official in charge of the selection of a jury discriminates against a citizen because of his race, etc.,⁴¹ or punish state officials who act in excess of their authority,⁴² e. g., while arresting a Negro they brutally beat him to death.⁴³ A state's judicial decrees may also be federally reviewed, for state action thereby results,⁴⁴ as is similarly the case with a state's prosecuting officials, or its board of equalization;⁴⁵ in other words, "These prohibitions extend to all acts of the state, whether through its legislative, its executive, or its judicial authorities."⁴⁶

of the government itself." *Ex parte Yarbrough* (1884) 110 U.S. 651, 666, 4 S.Ct. 152, 28 L.Ed. 274. See also *United States v. Saylor* (1944) 322 U.S. 385, 64 S.Ct. 1101, 88 L.Ed. 1341, *Screws v. United States* (1945) 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495.

41. *Ex parte Virginia* (1880) 100 U.S. 339, 344, 25 L.Ed. 676. Justices Field and Clifford dissented, one ground being that the state judge here was performing a judicial duty in selecting the jurors and that this was an act of judicial discretion, and therefore not subject to the federal power.

42. *United States v. Classic* (1941) 313 U.S. 299, 326, 61 S.Ct. 1031, 85 L.Ed. 1368; *Yick Wo v. Hopkins* (1886) 118 U.S. 356, 6 S.Ct. 64, 30 L.Ed. 220.

43. *Screws v. United States*, *supra* note 40, and *Home Teleg. & Tel. Co. v. Los Angeles* (1913) 227 U.S. 278, 287, 33 S.Ct. 312, 57 L.Ed. 510; on the statute, see *Williams v. United States* (1951) 341 U.S. 97, 71 S.Ct. 581, 95 L.Ed. 758, and

Koehler v. United States (1951) 342 U.S. 852, 72 S.Ct. 75, 96 L.Ed. 643.

44. *Shelley v. Kraemer* (1948) 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (*The Restrictive Covenant Case*); see also *Barrows v. Jackson* (1953) 346 U.S. 249, 73 S.Ct. 1031.

45. *Mooney v. Holohan* (1934) 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, *Raymond v. Chicago Union Traction Co.* (1907) 207 U.S. 20, 28 S.Ct. 7, 52 L.Ed. 78.

46. *Scott v. McNeal* (1894) 154 U.S. 34, 45, 14 S.Ct. 1108, 38 L.Ed. 896, (improper judicial conduct), and see note 40, *supra*, the *Civil Rights Cases*, at p. 17 where Justice Bradley also said that the constitutional rights cannot be impaired by the wrongful acts of individuals "unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings." Thus to the departments of the state may be added "customs" as another aspect of state action. See concurring opinion of Justice Douglas in *Garner v. Louisiana* (1961) 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207.

Chapter XVIII

THE DUE PROCESS CLAUSE—SUBSTANTIVE

§ 385. Introductory

The Due Process Clause is sufficiently important to warrant separate analyses of its substantive and procedural aspects. It is today probably the greatest single limitation upon the states. The Clause may be violated through a state's "judicial, as well as through its legislative, executive, or administrative branch of government."¹ "Congress, of course, does not have the final say as to what constitutes due process under the Fourteenth Amendment."^{1a}

Beginning with § 328 we examined the Bill of Rights from a substantive point of view, and beginning with § 337 from a procedural one. In § 334 the 5th Due Process Clause was likewise broken into a substantive and a procedural aspect, which were then examined in §§ 335 and 344 respectively. In § 347 the consequences of a substantive or a procedural violation were elaborated upon, e. g., "Where the First Amendment applies, it is a denial of all governmental power in our Federal system,"² but where procedural requirements apply, the governments may usually try again (see also § 464). In § 327 we asked whether the 14th Amendment's P & I Clause had incorporated the Bill of Rights as a limitation upon the states (no), or whether the 14th Due Process Clause had so done (no), or, perhaps, whether either clause had been so interpreted judicially as to include concepts found in one or more of the individual first eight amendments (yes). In other words, the terms "substance" and "substantive," and "procedure" and "procedural," are somewhat known and understood by us,³ and we can so analyze this most significant limitation upon the states. This Chapter concerns itself with substantive due

1. *Brinkerhoff-Faris Trust & Savings Co. v. Hill* (1930) 281 U.S. 673, 680, 50 S.Ct. 451, 74 L.Ed. 1107, per Brandeis. See also *Mooney v. Holohan* (1935) 294 U.S. 103, 113, 55 S.Ct. 340, 79 L.Ed. 791, and § 380, note 46.

1a. *State Bd. of Ins. v. Todd Shipyards Corp.* (1962) 370 U.S. 451, 457, 82 S.Ct. 1380, 8 L.Ed.2d 620.

2. *Marsh v. Alabama* (1946) 326 U.S. 501, 511, 66 S.Ct. 276, 90 L.Ed. 265, per Frankfurter, concurring.

3. How to determine what is substantive and what is procedural is

important, difficult, and somewhat uncertain. For example, in a diversity case, *Guaranty Trust Co. v. York* (1945) 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 sets up the standard for so determining what is called the "outcome determinative" test, that whether an ambiguous rule is substantive or procedural is determined by whether a failure to apply the state rule will cause a substantially different result to the litigation, whereupon it is classified as substantive; if not, it is procedural. See also discussion in *Pritchard v. Downie* (E.D. Ark.1962) 201 F.Supp. 893.

process of law, and the one following deals with procedural due process.⁴

We may parenthetically remark that all state constitutions contain due process clauses, but that since a state's highest court finally construes its own due process meaning, variations are not alone possible but do occur in application and interpretation. It is generally when the federal clause, or any other federal clause, is alleged to be violated, that a federal constitutional question arises. While not necessarily advocating its adoption, the following paragraph may be considered as a preliminary, general approach to the substantive content of due process and to the manner in which the Supreme Court defines the clause:

"To be sure, this is a conclusion based on a judicial judgment in balancing two contending principles—the right of a citizen to political privacy, as protected by the Fourteenth Amendment, and the right of the State to self-protection. And striking the balance implies the exercise of judgment. This is the inescapable judicial task in giving substantive content, legally enforced, to the Due Process Clause, and it is a task ultimately committed to this Court. It must not be an exercise of whim or will. It must be an overriding judgment founded on something much deeper and more justifiable than personal preference. As far as it lies within human limitations, it must be an impersonal judgment. It must rest on fundamental presuppositions rooted in history to which widespread acceptance may fairly be attributed. Such a judgment must be arrived at in a spirit of humility when it counters the judgment of the State's highest court. But, in the end, judgment cannot be escaped—the judgment of this Court."⁵

§ 386. — "Persons" Includes Corporations and Aliens

In the Granger Cases, decided in 1877, nine years after ratification, railroad and business corporations attacked various state laws as a denial of due process; without any discussion of the

4. "Despite arguments to the contrary which had seemed to me persuasive, it is well settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure." Brandeis, dissenting, in *Whitney v. California* (1927) 271 U.S. 357, 373, 47 S.Ct. 641, 71 L.Ed. 1095; and see also *Jordan v. American Eagle Fire Ins. Co.* (App.D.C.1948) 169 F.2d 281, 288: "Those limitations are both procedural and substantive." See, however, concurrence of Black

(with Murphy) in *Federal Power Commission v. Hope Natural Gas Co.* (1944) 320 U.S. 591, 620, 64 S.Ct. 281, 88 L.Ed. 333, where the Justice states that "Even this Court has not always fully embraced the principle 'that courts, rather than legislative bodies, possess final authority over regulation of economic affairs.'"

5. Justice Frankfurter (Harlan joining) in *Sweezy v. New Hampshire* (1957) 354 U.S. 234, 266-267, 77 S.Ct. 1203, 1 L.Ed.2d 1311.

question the court assumed these plaintiffs came within the provisions of the amendment.⁶ The question was directly raised in 1882, and by 1886 the court refused to hear argument on whether corporations were included within "persons," for "We are all of opinion that it does."⁷ That same year a unanimous court felt "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality"⁸

In 1938 Justice Black, dissenting, felt that only natural persons came within the ambit of the clause. He remarked that "It has not been decided that this clause prohibits a state from depriving a corporation of 'life,' " and pointed to a decision holding that "the liberty guaranteed by the Fourteenth Amendment against deprivation without due process of liberty is the liberty of natural, not artificial persons." Thus, he concluded, since the court had been and now was still permitting a corporation to use the clause to protect its property, the language should be recast as follows: "Nor shall any State deprive any human being of life, liberty or property without due process of law; nor shall any State deprive any corporation of property without due process of law."⁹ Eleven years later he was joined by Justice Douglas in so objecting, but this time Justice Jackson, who wrote the majority opinion, also wrote a short addendum, pointing out that the 1938 dissent "did not commend itself, even to such consistent liberals as Mr. Justice Brandeis and Mr. Justice Stone, and I had supposed it was no longer pressed." He also mentioned several other cases decided at that term where "the same question was appropriate for consideration, as here," but had not been made, and then cited two prior cases in which the two dissenters had joined in granting corporations relief without objecting.¹⁰

6. *Munn v. Illinois* (1877) 94 U.S. 113, 24 L.Ed. 77; see also *Smyth v. Ames* (1898) 169 U.S. 466, 522, 526, 18 S.Ct. 418, 42 L.Ed. 819.

7. Section 360, notes 49, 50. Although the Equal Protection Clause was there involved, the principle and coverage applies here. See also *Wheeling Steel Corp. v. Glander* (1949) 337 U.S. 562, 574, 69 S.Ct. 1291, 93 L.Ed. 1544, and note 10, *infra*.

8. *Yick Wo v. Hopkins* (1886) 118 U.S. 356, 369, 6 S.Ct. 1064, 30 L.Ed. 220. See also *Hernandez v. Texas* (1954) 347 U.S. 475, 477-478, 74 S.Ct. 667, 98 L.Ed. 866.

9. *Connecticut General Life Ins. Co. v. Johnson* (1938) 303 U.S. 77, 88, 58 S.Ct. 436, 82 L.Ed. 673, quoting

from *Western Turf Ass'n v. Greenberg* (1907) 204 U.S. 259, 363, 27 S.Ct. 384, 51 L.Ed. 520. On the question, and in agreement, see also *Northwestern National Life Ins. Co. v. Riggs* (1906) 203 U.S. 243, 27 S.Ct. 126, 51 L.Ed. 118, although because of the 1st Amendment's freedom (liberty?) of press, found within the 14th, corporations have successfully attacked state action, e. g., *Grosjean v. American Press Co.* (1936) 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660, *Bridges v. California* (1941) 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192.

10. *Wheeling Steel Corp. v. Glander*, *supra* note 7. The dissent is at pp. 576-581, and the addendum is at pp. 574-576, the quotation being at p. 575.

§ 387. — The Police Power

A state's police power permits it to act upon, and restrain or regulate, liberty and property, limited only by constitutional and reasonable judicial requirements. Chapter XIII has examined this overall question, and we have quoted one decision to the effect that the Due Process Clause could not override "the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community" Thus, "The only matter that seems to us open to debate is whether the statute goes too far."¹¹ In addition, the means employed by the state to exercise this police power must not be arbitrary or oppressive, and there must be a reasonable relation to the end sought to be accomplished.¹² The requirements of substantive due process thus may be used against either or both the power or the means, and procedural due process is likewise available as against the latter. Of course a state's power may be pressed too far, and thus become either unreasonable or even confiscatory; additionally, the power to, for example, permit a utility or quasi-monopolist to fix its own rates is construed most strictly against such a grant, and reasonable rates, subject to substantive due process, may nevertheless be fixed by a state legislature or commission.¹³ The particular language of Justice Roberts (for a majority which included Hughes, Brandeis, Stone and Cardozo) is apropos:

"The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution."¹⁴

11. Section 298, notes 37 and 39.

12. *Treigle v. Acme Homestead Ass'n* (1936) 297 U.S. 189, 197, 56 S.Ct. 408, 80 L.Ed. 575.

13. See, e. g., *Stone v. Farmers Loan & Trust Co.* (1886) 116 U.S. 307, 6 S.Ct. 334, 29 L.Ed. 636, where a charter grant was interpreted by the majority as permitting state control of rates, and Justices Har-

lan and Field dissented separately, although both agreed that the charter should be interpreted so as to grant the power to fix rates to the utility, thus resulting in an impairment of the contract by the state. See also the *Munn* cases, *supra* note 6.

14. *Herndon v. Lowry* (1937) 301 U.S. 242, 258, 57 S.Ct. 732, 81 L.Ed. 1066.

§ 388. — The Substantive Content of Due Process

The concept of due process¹⁵ was used substantively in a state court before the federal judiciary used either its 5th or 14th like clause. In 1856 a New York court so invalidated a law permitting the summary destruction of liquor,¹⁶ so that a person's substantive right to property was now upheld. By way of dictum Chief Justice Taney, the following year, opined a like view under the 5th,¹⁷ but in the first "great" case arising under the new amendment neither counsel nor the majority seemed to feel it of importance.¹⁸ It remained for the Granger Cases of 1877 to find counsel arguing at length that state (police power) regulation of rates was a due process violation, to which the two dissenters agreed although opposing the majority's holding that the state's power was properly exercised.¹⁹ Ten years later, however, eight Justices felt that notice and hearing were not required in the assessment of realty for the purpose of draining swamp lands in New Orleans, and rejected a due process argument. Justice Miller delivered his famous dictum:

"It is not a little remarkable, that while this provision has been in the Constitution . . . for nearly a century, . . . its powers [have] rarely been invoked in the judicial forum But while it has been a part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the XIVth Amendment. . . ."

"But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded. . . ."²⁰

15. For references to its historical background, see § 334, note 43.


16. *Wynehamer v. People* (1856) 13 N.Y. 378.

17. *Dred Scott v. Sandford* (1857) 19 How. 393, 450, 15 L.Ed. 691: "And an Act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offense against the laws, could hardly be dignified with the name of due process of law."

18. *Slaughter-House Cases* (1873) 16 Wall. 36, 21 L.Ed. 394.

19. *Munn v. Illinois*, *supra* note 6.

20. *Davidson v. New Orleans* (1878) 96 U.S. 97, 103-104, 24 L.Ed. 616. At pp. 101-102 the Justice had "confessed, however, that the constitutional meaning or value of the phrase 'due process of law,' remains to-day without that satisfactory precision of definition which judicial decisions have given to nearly all the other guaranties of personal rights found in the Constitutions of the several States of the United

 Six years later the court rejected a due process argument by the holders of a legislative monopoly privilege which was repealed,²¹ but in 1890 they held squarely and unequivocally that "the reasonableness of a rate . . . is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States" ²²

§ 389. — — The Standard for Determining Content

When the terms, life, liberty, or property are sought to be fleshed out and a substantive content given to them various methods may be employed. For example, one may seek to define them by reference to dictionary meanings; or an historical interpretation may be given, based upon aspects of the English and colonial common law; or one may say that the Bill of Rights, in its substantive amendments, enumerates and limits substantive due process (§§ 394–397 explore this); or an effort may be made to refer to cases which go into these (§§ 390–393). But in any of such methods involving the Bill of Rights those amendments themselves must be first defined or interpreted; or the cases to which reference is made themselves build upon and from others, or definitions, or something else; what, therefore, can the standard or the base be, from and upon which life, liberty, or property may be understood? The early cases strove to determine the meaning of due process historically, that is, at first they apparently limited it to a procedural aspect, until finally a sub-

States." Justice Bradley concurred in the approach quoted in the text, "But I think it [the majority opinion] narrows the scope of inquiry as to what is due process of law more than it should do." At p. 107.

21. *Butchers' Union Slaughter-House & Live Stock Landing Co. v. Crescent City Live Stock Landing & Slaughter-House Co.* (1884) 111 U.S. 746, 4 S.Ct. 652, 28 L.Ed. 585, although in the *Slaughter-House Cases*, supra note 18, they had succeeded in having this monopoly upheld. See, further, § 373, note 10, and § 378, note 23.

22. *Chicago, Milwaukee, & St. Paul Ry. Co. v. Minnesota* (1890) 134 U.

S. 418, 458, 10 S.Ct. 462, 33 L.Ed. 970. See also note 13, supra. Justice Field had dissented in the *Munn* case, supra note 6, arguing for an interpretation of due process which would extend it to encompass state legislation, and in 1888 he again dissented, arguing that due process "has always been supposed to secure to every person the essential conditions for the pursuit of happiness and is, therefore, not to be construed in a narrow or restricted sense." *Powell v. Pennsylvania* (1888) 127 U.S. 678, 691, 8 S.Ct. 992, 32 L.Ed. 253.

stantive aspect was accepted. Now this latter had to be, and still has to be, understood.

The Supreme Court today is sharply divided on the question of a due process standard, with the majority being opposed by Justices Douglas and Black. The disagreement may be characterized as the fluid versus the static (or, rather, the quasi-static), or the general versus the specific; the Black-Douglas team also characterizes the majority as being composed of natural law adherents, who refuse to give some degree of fixed content to due process, and desire to keep it elastic and determine each case by their own personal views of what is at the moment just or fair or reasonable. The dissenting statement of Holmes is used against the majority, that "As the decisions now stand I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the [14th] Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions [We] should be slow to construe the [due process] clause in the 14th Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass."²³ Perhaps the best summary of the views of the two Justices may be Black's own words:

"To hold that the Fourteenth Amendment was intended to and did provide protection from state invasions of the right of free speech and other clearly defined protections contained in the Bill of Rights, is quite different from holding that 'due process,' an historical expression relating to procedure, confers a broad judicial power to invalidate all legislation which seems 'unreasonable' to courts. In the one instance, courts proceeding within clearly marked constitutional boundaries seek to execute policies written into the Constitution; in the other they roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people."²⁴

In a subsequent case Justice Reed, for the majority of five, again said that "The due process clause . . . does not draw all the rights of the federal Bill of Rights under its protection," Justice Frankfurter devoted a separate concurring opinion solely to supporting this proposition, Justices Black and Douglas dissented and desired to overrule prior decisions because "that [Twining] decision and the 'natural law' theory of the Constitu-

23. *Baldwin v. Missouri* (1930) 281 U.S. 586, 595, 50 S.Ct. 436, 74 L.Ed. 1056. Brandeis and Stone agreed with the opinion.

24. *Federal Power Commission v. Natural Gas Pipeline Co. of America* (1942) 315 U.S. 575, 601, fn. 4, 62 S.Ct. 736, 86 L.Ed. 1037.

tion upon which it relies degrade the constitutional safeguards of the Bill of Rights and simultaneously appropriate for this Court a broad power which we are not authorized by the Constitution to exercise," and Justices Murphy and Rutledge agreed with Black and Douglas "that [while] the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment," we are "not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights."²⁵

In other words four Justices then desired to incorporate the entire Bill of Rights, as against five who refused, but these four split evenly on whether to limit the Due Process Clause to a content measured by the Bill of Rights, two saying yes and two saying they desired to go further. Of these four only Black and Douglas are upon the bench today. But insofar as standards are concerned whereby the majority (plus the dissenting Justices Murphy and Rutledge when matters beyond the Bill of Rights are involved) may seek for guidance in determining the content of due process, Justice Reed quoted that state action must "be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land;'"²⁶ Justice Frankfurter quoted that "all that is meant is that due process contains within itself certain minimum standards which are 'of the very essence of a scheme of ordered liberty;'"²⁷ Justice Black felt that "to pass upon the constitu-

25. *Adamson v. California* (1947) 332 U.S. 46, 53, 70, 124, 67 S.Ct. 1672, 91 L.Ed. 1903. The majority held the self-incrimination portion of the 5th Amendment was not within the 14th's procedural clause. The case has been discussed in § 378, notes 35-36. In the *Adamson* case, Justice Black referred at length to the history of the 14th Amendment, and concluded that "In effect, the Slaughter-House Cases rejected the very natural justice formula the Court today embraces." At pp. 77-78. Justice Frankfurter, at p. 65, retorted, "In the history of thought 'natural law' has a much longer and much better founded meaning and justification than such subjective selection of the first eight Amendments for incorporation into the Fourteenth."

26. *Ibid.*, at p. 54, fn. 13, quoting from *Hebert v. Louisiana* (1926) 272 U.S. 312, 316, 47 S.Ct. 103, 71 L.Ed. 270.

27. The *Adamson* case, *supra* note 25, at p. 65, quoting from *Palko v. Connecticut* (1937) 302 U.S. 319, 325, 58 S.Ct. 149, 82 L.Ed. 288. At pp. 61-65 Frankfurter discloses how the Justices before whom the 14th Amendment originally came lined up, and says "It is not invidious to single out Miller, Davis, Bradley, Waite, Matthews, Gray, Fuller, Holmes, Brandeis, Stone and Cardozo (to speak only of the dead) as judges who," in effect, were on his side of the controversy. He also writes that for seventy years after the ratification of the 14th Amendment, its scope "was passed upon by forty-three judges. Of all these

tionality of statutes by looking to the particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing; to invalidate statutes because of the application of 'natural law' deemed to be above and undefined by the Constitution is another;"²⁸ and Justice Murphy wrote that state actions other than denounced in the Bill of Rights may "fall short of conforming to fundamental standards of procedure"

Perhaps the substantive standard may be expressed in the view that "It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government," and the procedural standard may be found in the view that only those procedures are due process ones which are "of the very essence of a scheme of ordered liberty."²⁹

§ 390. Life, Liberty or Property—In General

The 14th Amendment's § 1, second sentence, states that "No State shall . . . deprive any person of life, liberty, or property, without due process of law."³⁰ The substantive portion is contained within the terms, life, liberty, or property. What do these terms mean, or, rather, what do they embrace? Almost immediately after the ratification of the 14th Amendment one Justice called these "fundamental rights," which "are equiva-

judges, only one, who may respectfully be called an eccentric exception, even indicated the belief that the Fourteenth Amendment was a shorthand summary of the first eight Amendments" At p. 62.

28. At p. 91, also quoting from the Natural Gas Pipeline case, *supra* note 4, at p. 599, as quoted previously at note 24, *supra*. And, at p. 91, fn. 18, the Justice quoted from *Calder v. Bull* (1798) 3 Dall. 386, 398, 399, 1 L.Ed. 648, per Iredell, J. In *Hutcheson v. United States* (1962) 369 U.S. 599, 82 S.Ct. 1005, 82 L.Ed.2d 137, Chief Justice Warren's dissent, from the 4-2 upholding of a conviction of a witness who refused to answer the questions of a Congressional committee, included the statement that "The Bill of Rights, not Congress, establishes the standards which must be observed before people in this country may legally be sent to jail." See also § 340, note 104.

See also Jackson's language in *West Virginia State Board of Education v. Barnette* (1943) 319 U.S. 624, 639-640, 63 S.Ct. 1178, 87 L.Ed. 1628.

29. *Holden v. Hardy* (1898) 169 U.S. 366, 389, 18 S.Ct. 383, 42 L.Ed. 780, and *Palko v. Conn.*, *supra* note 27, at p. 325, respectively. On the *Holden* case, see also §§ 393 and 396, and also its statement at p. 390: "Recognizing the difficulty in defining, with exactness, the phrase 'due process of law,' it is certain that these words imply a conformity with natural and inherent principles of justice"

30. Before 1868 the 5th Due Process Clause had been felt to relate solely to accepted procedures whereby life, liberty, or property was sought to be controlled. *Den ex dem. Murray v. Hoboken Land & Improvement Co.* (1855) 18 How. 272, 15 L.Ed. 372. But Taney, perhaps by the force of circumstances, suggested that certain property interests were also safeguarded from the federal government's authority. The *Dred Scott* case, *supra* note 17 (examined in §§ 357, 359, 362). Today, of course, both the 5th and the 14th include substantive rights of persons against governmental action.

lent to the rights" "to life, liberty and the pursuit of happiness," while another Justice felt that the "amendment was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator; which the law does not confer, but only recognizes."³¹ In 1884 seven Justices, and unquestionably the other two agreed with this, felt that the maxims of liberty and justice in the new world held a "different place and performed a different function" than they did in England; that thus "they would receive and justify a corresponding and more comprehensive interpretation;" and that as "it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guaranty not [only] particular forms of procedure, but the very substance of individual rights to life, liberty and property."³² In other words, this substantive portion was to be broadly interpreted, and was now to become a limitation upon a state's power to act; and this was in addition to the other constitutional and decisional prohibitions and limitations found in express clauses, e. g., Art. I, § 10, or through substantive grants, e. g., the Commerce Clause, especially as disclosed in §§ 218-225, or procedural ones, e. g., the treaty power, as in § 188. However, as against this limiting power the coin-face police power of the states is to be cast (Chap. XIII), as well as any changed judicial interpretation which may thereby increase the state's power.

§ 391. — In Particular—Life

Within the first decade of its existence the 14th Amendment's "life" was felt to mean "something more . . . than mere animal existence. . . . The deprivation not only of life, but of whatever God has given . . . for its growth and enjoyment . . . , if its efficacy be not frittered away by judicial decision."³³

The term "life" is thus not a limited one in its definitional sense, but it is limited in that it does not embrace corporations.³⁴

31. Slaughter-House Cases, *supra* note 18, at pp. 116, 105, per Bradley and Field, both dissenting, Chase, Swayne, and Bradley concurring with Field.

32. *Hurtado v. California* (1884) 110 U.S. 516, 532, 4 S.Ct. 111, 28 L.Ed. 232.

33. *Munn v. Illinois*, *supra* note 6, at p. 142, per Field (Strong con-

curring), dissenting (Harlan was sworn in nine months later). See also his strong views in the second of the Granger Cases, at pp. 186-187.

34. See, e. g., the Conn. Gen'l. Life Ins. case, *supra* note 9, where at p. 88 the dissent states that "It has not been decided that this clause prohibits a state from depriving a corporation of 'life'."

§ 392. — — Liberty³⁵

Liberty and property are, to a certain extent, coin-faces. We discuss particular liberties or freedoms in §§ 398–401, there pertaining to religion, speech, etc., so that we cannot simply equate property with liberty and ignore all other aspects of the term. What we do in §§ 392–393 is to disclose their connection, each in its own way, and leave to later discussion the other liberties mentioned.

In 1877 the Supreme Court felt that “By the term ‘liberty’ . . . something more is meant than mere [physical] freedom The same liberal construction . . . should be applied to the protection of private property.”³⁶ In 1897 a unanimous bench denounced a Louisiana statute making it unlawful for a New Orleans cotton exporter to enter into a contract of insurance on his merchandise with a New York insurance company, which did no business in the state and had not complied with its requirements. The court felt the statute violated the Due Process Clause and also remarked:

“The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.”³⁷

35. Is this liberty, which is a limitation upon the states, to be equated with the freedoms which the 1st Amendment (as “incorporated” in the 14th) prevents Congress from abridging? See, e. g., Justice Jackson’s dissent in *Beauharnais v. Illinois* (1952) 343 U.S. 250, 288, 72 S.Ct. 725, 96 L.Ed. 919: “As a limitation upon power to punish written or spoken words, Fourteenth Amendment ‘liberty’ in its context of state powers and functions has meant and should mean something quite different from ‘freedom’ in its context of federal powers and functions.” See also Justice Harlan’s separate opinion in *Roth v. United States* (1957) 354 U.S. 476, 496, at p. 505, 77 S.Ct. 1304, 1 L.Ed.2d 1498, and § 398.

Insofar as Justice Black’s dissent in the *Connecticut Gen’l. Life* case, su-

pra note 9, at p. 88, states that “This Court has expressly held that ‘the liberty’” so guaranteed “is the liberty of natural, not artificial persons,” quoting from *Selover, Bates & Co. v. Walsh* (1912) 226 U.S. 112, 126, 33 S.Ct. 69, 57 L.Ed. 146, the cases in this section disclose the contrary.

36. The *Munn* case, *supra* note 6, at p. 142.

37. *Allgeyer v. Louisiana* (1897) 165 U.S. 578, 589, 17 S.Ct. 427, 41 L.Ed. 832. The court also cited and quoted from *P & I* cases, as well as from *Powell v. Pennsylvania*, *supra* note 22, at p. 684, where Harlan had also so held, as dictum, concerning the Due Process Clause. See also *Bolling v. Sharpe* (1954) 347 U.S. 497, 499–500, 74 S.Ct. 693, 98 L.Ed. 884: “Although the Court has not

The following year the court brought property also within liberty in the sense that since its acquisition was impossible save by contract, property and liberty therefore became coupled,³⁸ so that liberty of contract was now constitutionally protected,³⁹ and in 1921 a dissenting four wrote, "The security of property, next to personal security against the exertions of government, is of the essence of liberty. They are joined in protection. . . ." ⁴⁰ The concept of liberty was thus not a restricted one, and the following from a 1923 opinion so indicates:

"While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." ⁴¹

This substantive concept of liberty was not a judicially unanimous one, for in the 1905 *Lochner* case there were dissenting opinions by Justices Harlan (White and Day concurring) and Holmes, the former placing his dissent upon the state's police powers, and the latter upon his view that "This case is decided upon an economic theory which a large part of the country does not entertain. . . . The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." ⁴² Holmes then referred

assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective."

38. See § 393, note 50, *infra*, and also § 390, note 29, *supra*, applied in *Muller v. Oregon* (1908) 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551, to sustain a ten-hour law for women in laundries (the famous "Brandeis Brief" was first used here).

39. *Lochner v. New York* (1905) 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937, but the holding is no longer followed or controlling, e. g., the *West Coast Hotel* case, *infra* note 47.

40. *Block v. Hirsh* (1921) 256 U.S. 135, 165, 41 S.Ct. 458, 65 L.Ed. 865.

The majority upheld rent control in the District of Columbia. See also *Berman v. Parker* (1954) 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27, upholding a condemnation in a slum-clearance redevelopment effort.

41. *Meyer v. Nebraska* (1922) 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042.

42. *Lochner v. New York*, *supra* note 39, at p. 75; the quotation below is at pp. 75-76, with the following paragraph added to the quoted one: "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think

to several cases in which state legislation, impairing the liberty of contract, had been upheld, and closed his opinion with these words:

"Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

Ten years after the *Lochner* case was decided the court denounced federal and state legislation invalidating yellow-dog contracts, these latter being required by employers as a condition of employment and obligating employees not to be or become union members on pain of dismissal.⁴³ And in 1923 a five-Justice majority voided federal legislation setting minimum wages for women employed in the District of Columbia.⁴⁴ Liberty under the Due Process Clause thus became a judicial curb upon, and club over, state legislation, and into the 1930's the famous statement by Stone, "It is difficult to imagine any grounds, other than our own personal economic predilections,"⁴⁵ may be said to be the key to the decisions then being handed down by a majority. The New Deal brought reversals in many areas of business activities, and when Chief Justice Hughes wrote in a dissent that "liberty of contract is a qualified and not an absolute right,"⁴⁶ the beginning of a new approach was inevitable. The following year, in 1937, the about-face occurred in the judiciary's attitude toward minimum wage legislation⁴⁷ and other aspects of business

that the word 'liberty,' in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work. Whether in the latter as-

pect it would be open to the charge of inequality I think it unnecessary to discuss."

43. *Adair v. United States* (1908) 208 U.S. 161, 28 S.Ct. 277, 52 L.Ed. 436, and *Coppage v. Kansas* (1915) 236 U.S. 1, 18, 35 S.Ct. 240, 59 L.Ed. 441.

44. *Adkins v. Children's Hospital* (1923) 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785.

45. *Morehead v. New York ex rel. Tipaldo* (1936) 298 U.S. 587, 633, 56 S.Ct. 918, 80 L.Ed. 1347. See also quotation at p. 636.

46. *Ibid.*, at p. 628.

47. *West Coast Hotel Co. v. Parrish* (1937) 300 U.S. 379, 57 S.Ct. 578,

freedoms,⁴⁸ further discussed in § 393. But these restrictions upon entrepreneurial liberty brought a corresponding degree of legislative power over the liberties of labor. As seen in the next section, the general area of labor-management relations were nationally and locally regulated and controlled by statutes, beginning with 1932, and in 1949 Justice Black held that labor was constitutionally compelled to accept the bad with the good results flowing from the new judicial approach.

"The *Allgeyer-Lochner-Adair-Coppage* constitutional doctrine was for some years followed by this Court. It was used to strike down laws fixing minimum wages and maximum hours in employment, laws fixing prices, and laws regulating business activities. . . .

"This Court beginning at least as early as 1934, when the *Nebbia* case was decided, has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.

. . .
 "Appellants now ask us to return, at least in part, to the due process philosophy that has been deliberately discarded. . . ."⁴⁹

81 L.Ed. 703, a 5-4 decision; at p. 400 numerous references to previous decisions are given, and the *Adkins* case, *supra* note 44, is overruled. See also *United States v. F. W. Darby Lumber Co.* (1941) 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609. In the *Parrish* case, *supra*, at p. 391, the court wrote: "The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in

relation to its subject and is adopted in the interests of the community is due process."

48. See, e. g., *Obsborn v. Ozlin* (1940) 310 U.S. 53, 60 S.Ct. 758, 84 L.Ed. 1074, upholding a Virginia statute forbidding insurance contracts except under certain conditions; *Watson v. Employers Liability Assurance Corp.* (1954) 348 U.S. 66, 75 S.Ct. 166, 99 L.Ed. 74, permitting a direct suit by an injured person against a tort-feasor's insurance company.

49. *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.* (1949) 335 U.S. 525, 537, 69 S.Ct. 251, 93 L.Ed. 212. See also *A. F. L. v. American Sash & Door Co.* (1949) 335 U.S. 538, 69 S.Ct. 258, 93 L.Ed. 222 (a companion case); *Railway employees' Dep't. v. Hanson* (1956) 351 U.S. 225, 76 S.Ct. 714, 100 L. Ed. 1112 (upholding the union shop under the Railway Labor Act as against state legislation opposing

§ 393. — — Property⁵⁰

Although rejecting a contention that an employer's property rights, i. e., the right to contract for employment, had been infringed by the state's regulation of hours of work in underground mines, the court, with two dissents, felt that any general impairment of the right to contract would be invalid.⁵¹ In 1920 a bare majority of the court upheld a temporary rent control statute upon the basis of a valid exercise of police power, and Holmes, *inter alia*, wrote that "The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed." The dissenters also spoke of property, and cast it in a dual role, i. e., that its control and use determine its value, and that its protection is a vital principle of our institutions.⁵²

Property is thus not limited to physical, but includes the non-physical, that is, all the valuable interests one can possess outside of life and liberty. Thus the right to use, lease, and dispose of property is within the term, as is the right to a lien, judgment, etc.⁵³ Rate-making by administrative agencies involves price regulation and sometimes confiscation, thus also becoming subject to due process property considerations. The Granger Cases of 1877 in effect left public utility price control in the hands of the states through their agencies, but the Minnesota Rate Case of 1890 condemned a state law making commission rates final and conclusive, for "reasonableness . . . is eminently a question for judicial investigation, requiring due process of law for its determination."⁵⁴ By 1898 the Supreme Court felt that under due process the commission rates must yield a fair return upon a present fair market value, that is, replacement costs,⁵⁵ but in 1942 a majority felt that "the Con-

it); also *Day-Brite Lighting v. Missouri* (1952) 342 U.S. 421, 423, 72 S.Ct. 405, 96 L.Ed. 469: "we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare."

50. The Contract Clause of Art. I, § 10, analyzed in § 311, also involves aspects of property and business regulation, applicable to this discussion.

51. *Holden v. Hardy*, supra note 29, at p. 391, and see also § 389; the court pointed to a recent overruling of a state prohibition upon the making of private contracts of insurance as an illustration of this, the *Allgeyer* case, supra note 37.

52. *Block v. Hirsh*, supra note 40, at p. 165.

53. See, e. g., *Campbell v. Holt* (1885) 115 U.S. 620, 6 S.Ct. 209, 29 L.Ed. 483, per Bradley, dissenting; *Terrace v. Thompson* (1923) 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255; *Lynch v. United States* (1934) 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434.

54. *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota* (1890) 134 U.S. 418, 458, 10 S.Ct. 462, 33 L.Ed. 970; the Granger Cases are at note 6, supra.

55. *Smyth v. Ames*, supra note 6, repudiated in *F. P. C. v. Hope Natural Gas Co.* (1944) 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333. The *Smyth*

stitution does not bind rate-making bodies to the service of a single formula.”⁵⁶ Whether or not this means a return to Brandeis’ “prudent investment” formula⁵⁷ is uncertain; at present the Supreme Court is still reviewing commission rates upon due process concepts, even if standards are indefinite.⁵⁸

The Granger Cases were above related to state control of the rates a public utility might charge. But those cases set forth the doctrine of a “business affected with a public interest,” that is, that such businesses, and not alone public utilities, might be so rate and price controlled. The decisions which followed the Granger Cases began to equate these two, however, to the point where private businesses were held to be without the state’s price or rate power, and this because they were interpreted not to be

formula was denounced by Holmes, who used “delusive exactness” and “speculative” as words of opprobrium, *Louisville v. Cumberland Telephone & Teleg. Co.* (1913) 225 U.S. 430, 436, 32 S.Ct. 572, 56 L.Ed. 934, and by Brandeis, who termed it “legally and economically unsound” and “delusive.” *Missouri ex rel. Southwestern Bell Tel. Co. v. P. S. C.* (1923) 262 U.S. 276, 290, 292, 43 S.Ct. 544, 67 L.Ed. 981. Brandeis gives an excellent analysis of the historical background of reproduction cost, etc., and his conclusion is at pp. 306-307. See also his analysis in *St. Louis & O’Fallon Ry. Co. v. United States* (1929) 279 U.S. 461, 468, 49 S.Ct. 384, 73 L.Ed. 798.

56. *F. P. C. v. Natural Gas*, supra note 24, at p. 586. The bench was unanimous in upholding the commission’s rate order. Justices Black, Douglas, and Murphy dissented “in so far as the Court assumes that, regardless of the terms of the statute, the due process clause of the Fifth Amendment grants it power to invalidate an order as unconstitutional because it finds the charges to be unreasonable” P. 599. They felt (Black writing) “that in a recent series of cases, this Court has held that legislative price-fixing is not prohibited by the due process clause,” in a footnote saying that “Some of these cases arose under the Fifth, some under the Fourteenth Amendment.” This series of cases thus “returned in part at least to the constitutional princi-

ples which prevailed for the first hundred years of our history,” although Justices Field and Strong, in 1877, emphatically disagreed; that in 1886 there was a yielding in part by Chief Justice Waite; and in 1890 a repudiation of Waite and a return to the Field-Strong views by a new court; so that it is only since then that “‘due process’ means no less than ‘reasonableness judicially determined.’” P. 600. Justice Frankfurter’s separate concurrence was directed solely against these views, and at p. 609 (citations omitted) he pointed to the “legal history” that Waite had earlier authored the confiscation doctrine, and its corollary of judicial review, and that “His view was shared by such stout respecters of legislative power over utilities as Mr. Justice Miller, Mr. Justice Bradley, and Mr. Justice Harlan. The latter, indeed, agreed with Mr. Justice Field that the regulatory power exercised in the Railroad Commission Cases constituted an impairment of the obligation of contract. By no one was the doctrine of judicial review more emphatically accepted, and applied in favor of a public utility, than by Mr. Justice Harlan”

57. The *Southwestern Bell* case, supra note 55, at pp. 306, 308.

58. See, e. g., *Driscoll v. Edison Light & Power Co.* (1939) 307 U.S. 104, 59 S.Ct. 715, 83 L.Ed. 1134, esp. Frankfurter’s concurrence at p. 122; the *Natural Gas* case, supra note 24, at pp. 599, 602.

public utilities. (This remained the law until 1934 when five Justices felt "that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good."⁵⁹ In other words, all business and property is subject to the paramount power of the state, and where the court has denounced any regulation the "decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells."⁶⁰ When these "proper occasions" occur, and what these "appropriate measures" are is, of course, to be initially promulgated by the state and finally determined by the judges.⁶¹ For example, since there is today "a basic departure from the philosophy and approach of the majority" in the old line of cases, then the judiciary will permit the legislatures

"to determine the just and reasonable charges of persons engaged in the business of buying and selling in interstate commerce livestock at a stockyard on a commission basis.

. . . [So a] statute limiting commissions of agents of

59. *Nebbia v. New York* (1934) 291 U.S. 502, 536, 54 S.Ct. 505, 78 L.Ed. 940. The court said: "We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility." At p. 531. "But we are told that because the law essays to control prices it denies due process. . . . We think there is no such principle. The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property." At pp. 531-532.

Included in the background of this case are the powerful dissents registered against the concept of a business affected with a public interest. For example, in 1927 Justice Stone called this "Vague and illusory," *Tyson & Brother v. Banton* (1927) 273 U.S. 418, 447, 47 S.

Ct. 426, 71 L.Ed. 718, and a year later he reminded his colleagues that the phrase was not to be found in the Constitution and so was a judicial invention. *Ribnik v. McBride* (1928) 277 U.S. 350, 359, 374, 48 S.Ct. 545, 72 L.Ed. 913.

60. The *Nebbia* case, *supra* note 59, at pp. 536-537.

61. The fears of Holmes, expressed in 1930, are apropos: "As the decisions now stand I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions." *Baldwin v. Missouri* (1930) 281 U.S. 586, 595, 50 S.Ct. 436, 74 L.Ed. 1056.

fire insurance companies was sustained A New York statute authorizing the fixing of minimum and maximum retail prices for milk was upheld in 1934. . . . In 1937 *Adkins* . . . was overruled and a statute of Washington which authorized the fixing of minimum wages for women and minors was sustained. In the same year [we] upheld a Georgia statute fixing maximum warehouse charges for the handling and selling of leaf tobacco. . . . The power of Congress under the commerce clause to authorize the fixing of minimum prices for milk was upheld. The next year the price-fixing provisions of the Bituminous Coal Act of 1937 were sustained. And at this term we upheld the minimum wage and maximum hour provisions of the Fair Labor Standards Act. These cases represent more than scattered examples of constitutionally permissible price-fixing schemes. They represent in large measure a basic departure from the philosophy and approach of the majority in [previous cases]."⁶²

Business, as well as labor, is, of course, subject to many other forms of restraint against which due process arguments were rejected, e. g., government competition,⁶³ the anti-injunction laws, the labor relations and labor-management relations laws.⁶⁴ In addition, questions concerning the licensing of professions and businesses, or cases upholding limitations on occupations, also involve due process arguments,⁶⁵ and the overall *laissez-faire*

62. *Olsen v. Nebraska* (1941) 313 U. S. 236, 245, 244, 61 S.Ct. 862, 85 L. Ed. 1305 (citations omitted), reversing the *Ribnik* case, *supra* note 59. See also note 47, on the *Parish* case.

In *Safeway Stores, Inc. v. Oklahoma Retail Grocers' Ass'n, Inc.* (1959) 360 U.S. 334, 79 S.Ct. 1196, 3 L. Ed.2d 1280, a state law was upheld which prohibited selling certain grocery items below cost even though grocers were permitted to give trading stamps when selling at or near the statutory costs.

63. See, e. g., *Ashwander v. T. V. A.* (1936) 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688, *Green v. Frazier* (1920) 253 U.S. 233, 40 S.Ct. 499, 64 L. Ed. 878, *Jones v. Portland* (1917) 245 U.S. 217, 38 S.Ct. 112, 62 S.Ct. 252, *McCulloch v. Maryland* (1819) 4 Wheat. 316, 4 L.Ed. 579.

64. The *Norris-LaGuardia Anti-Injunction Act*, 29 U.S.C.A. §§ 1101 et seq., enacted in 1932 and thereafter adopted by most of the states; the

Wagner Labor Relations Act, 49 Stat. 449, 29 U.S.C.A. §§ 141, et seq., enacted in 1935 and thereafter amended and re-amended with different types of restrictions imposed by the *Taft-Hartley Act* of 1947 (61 Stat. 136) and the *Landrum-Griffin Act* of 1959 (73 Stat. 519). See also *Forkosch, Treatise on Labor Law* (1953) Chap. IV for numerous other types of legislation impinging upon employers and employees, e. g., workmen's compensation, unemployment insurance, anti-racketeering, and see also Chap. X on injunctions, and Chaps. XIV-XVI on labor board proceedings.

65. See, e. g., *Williamson v. Lee Optical of Oklahoma, Inc.* (1955) 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563; *Breard v. Alexandria* (1951) 341 U. S. 622, 71 S.Ct. 920, 95 L.Ed. 1233; *Daniel v. Family Security Ins. Co.* (1949) 336 U.S. 220, 69 S.Ct. 550, 93 L.Ed. 632; although an arbitrary exercise of power is still denounced, e. g., *Konigsberg v. State Bar of California* (1957) 353 U.S. 252,

philosophy of the Supreme Court applies likewise here.⁶⁶ Not the "old" type of *laissez-faire*, it should be pointed out, but the "new" type, that is, instead of leaving business alone as heretofore and denouncing state efforts to control it under due process limitations, the Supreme Court today leaves the state alone in controlling business and property despite arguments based upon due process. The state is thus permitted to balance the economic advantages and the disadvantages between permitting one type or the other of incompatible properties to exist, and its reasonable choice, based upon aiding that one in whose survival the state has the greatest stake, will not be rejected,⁶⁷ as will it also be permitted to enhance the value of one property by diminishing that of another,⁶⁸ and enacting reasonable zoning laws.⁶⁹ "It is now undeniable that a state may adopt reasonable regulations to prevent economic and physical waste of natural gas. This Court has upheld numerous kinds of state legislation designed to curb waste of natural resources and to protect the correlative rights of owners through ratable taking, or to protect the economy of the state. These ends have been held to justify control over production even though the uses to which property may profitably be put are restricted."⁷⁰

There are, of course, limits to the extent the new approach permits states to disregard due process, e. g., "Our law reports present no more glaring instance of the taking of one man's property and giving it to another,"⁷¹ so that the state's use of its police powers is sometimes denounced,⁷² as well as state efforts which run afoul the Supremacy Clause (Chap. XIV) or which unduly burden or affect a federal power (e. g., the Commerce Clause, Chap. X). Contrariwise, the states' own courts in a good many instances, if not usually, refuse to go as far as the federal Supreme Court has permitted them to go, that is, in upholding

77 S.Ct. 722, 1 L.Ed.2d 810; and in general, see also Forkosch, Administrative Law (1956) Chap. VII.

66. See, e. g., the quotation in § 392, keyed to note 49, *supra*.

67. *Miller v. Schoene* (1928) 276 U. S. 272, 48 S.Ct. 246, 72 L.Ed. 568, and Note, 30 Col.L.Rev. 360, 362 (1930). See also *Thomas v. Collins* (1945) 323 U.S. 516, 531-532, 65 S.Ct. 315, 89 L.Ed. 430, *Marsh v. Alabama* (1946) 326 U.S. 501, 509, 66 S.Ct. 276, 90 L.Ed. 265.

68. The *Schoene* case, *supra* note 67; and see also *Strickley v. Highland Boy Gold Mining Co.* (1906) 200 U.S. 527, 26 S.Ct. 301, 50 L.Ed. 581, permitting also private con-

demnation pursuant to statutory authorization.

69. *Village of Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303.

70. *Cities Service Gas Co. v. Peerless Oil & Gas Co.* (1950) 340 U.S. 179, 185-186, 71 S.Ct. 215, 95 L.Ed. 190.

71. Brandeis, in *Thompson v. Consolidated Gas Utilities Corp.* (1937) 300 U.S. 55, 79, 57 S.Ct. 364, 81 L. Ed. 510; see also *Brinkerhoff-Faris Trust & Savings Co.*, *supra* note 1.

72. See Chap. XIII, and also, e. g., *Liggett Co. v. Baldridge* (1928) 278 U.S. 105, 49 S.Ct. 57, 73 L.Ed. 204.

their own state legislation under their own state due process clauses.⁷³

The control of business does, of course, entail financial costs, for which no compensation is paid, "yet that gives rise to no constitutional infirmity. . . . Those are part of the costs of our civilization. . . . But if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision. We could strike down this law only if we returned to the philosophy of the *Lochner*, *Coppage*, and *Adkins* cases."⁷⁴ For example, in an eminent domain case "The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one."⁷⁵ So in a grade separation case, where a state P. U. C. authorized improvements and allocated the costs fifty-fifty between the railroad and the city, the Supreme Court pointed out that where "the improvements were instituted . . . to meet local transportation needs and further safety and convenience, made necessary by the rapid growth of the communities . . . [then] in the exercise of the police power, the cost of such improvements may be allocated all to the railroads."⁷⁶

§ 394. The "Incorporation" of the Bill of Rights—In General

The 14th Amendment's three clauses are the P & I, Due Process, and Equal Protection ones. In Chapter XVI we examined the background of this Amendment, and in Chapter XVII limited ourselves to the P & I Clause. We inquired what its definition was, whom it limited, and for whose benefit; and we also asked whether the Bill of Rights was to be coupled with the P & I Clause. In § 378 there were four choices presented, whether to go whole hog and say the Bill of Rights *per se* was completely and totally incorporated, or whether to hold the direct contrary, or whether to say some (the 1st and 7th) are, and others are not, or, finally, to proceed on a conceptual basis, i. e., certain concepts are found expressed in the Bill of Rights and implied in privileges and immunities. Since that "forgotten clause" (§ 379) could not be of much Bill of Rights aid in this

73. See Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 *Northwestern L.Rev.* 13, 226 (1958); Paulsen, *The Persistence of Substantive Due Process in the States*, 34 *Minn. L.Rev.* 91 (1950).

74. *The Day-Brite Lighting Case*, *supra* note 49, at pp. 424-425; see also text quotation to this note.

75. *Berman v. Parker*, *supra* note 40, at p. 32. Also, "The values it

[public welfare] represents are spiritual as well as physical, aesthetic as well as monetary." At p. 33.

76. "There is the proper limitation that such allocation of costs must be fair and reasonable." *Atchison, Topeka & Santa Fe Ry. Co. v. P. U. C.* (1953) 346 U.S. 346, 352, 74 S. Ct. 92, 98 L.Ed. 51.

respect, we turn to the Due Process Clause and ask, again, the same questions as before.

§ 395. — Total Incorporation

In §§ 377–378 we examined the “total incorporation” views of the justices from Field and Harlan to Black and Douglas, although the inquiry there was whether the P & I Clause was sufficient for this purpose; the answer was no. Insofar as the Due Process Clause is concerned, the same total incorporation line-up was and is found. In 1884 Harlan provided the theoretical arguments:

“It seems to me that too much stress is put upon the fact that the framers of the Constitution made express provision for the security of those rights which at common law were protected by the requirement of due process of law and, in addition, declared, generally, that no person shall ‘be deprived of life, liberty or property without due process of law.’ The rights, for the security of which these express provisions were made, were of a character so essential to the safety of the people that it was deemed wise to avoid the possibility that Congress, in regulating the processes of law, would impair or destroy them. Hence their specific enumeration in the earlier Amendments of the Constitution, in connection with the general requirement of due process of law, the latter itself being broad enough to cover every right of life, liberty or property secured by the settled usages and modes of proceeding existing under the common and statute law of England at the time our government was founded.”⁷⁷

In the Adamson case, discussed in § 389, we saw that the Black-Douglas view was to include the Bill of Rights, while the Murphy-Rutledge team not alone concurred in this but wanted to go beyond and interpret others which “fall short of conforming to fundamental standards of procedure” The majority, however, disagreed with all four of the minority, and desired neither to incorporate the Bill of Rights nor to use it as a standard by which to interpret the meaning and content of due process. In other words, the Supreme Court has rejected “again and again, after impressive consideration,” the view that due process of law is a “shorthand for the first eight amendments”⁷⁸

77. *Hurtado v. California* (1884) 110 U.S. 516, 550, 4 S.Ct. 111, 28 L.Ed. 232.

78. *Wolf v. Colorado* (1949) 338 U.S. 25, 26, 69 S.Ct. 1359, 93 L.Ed. 1782, a 4th unreasonable search and seizure case, with Black concurring

separately, and Douglas, Murphy, and Rutledge dissenting in two separate opinions; the holding itself has been overruled in *Mapp v. Ohio* (1961) 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081.

§ 396. — Conceptual Incorporation

The Twining case of 1908 gives explicit recognition of the views which have determined the majority holdings since 1868. Justice Moody there wrote that

"it is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law. Few phrases of the law are so elusive of exact apprehension as this. Doubtless the difficulties of ascertaining its connotation have been increased in American jurisprudence, where it has been embodied in constitutions and put to new uses as a limit on legislative power. This court has always declined to give a comprehensive definition of it, and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise. There are certain general principles, well settled, however, which narrow the field of discussion, and may serve as helps to correct conclusions.

. . .

"First. What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political conditions by having been acted on by them after the settlement of this country. . . .

"Second. It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practised by our ancestors, is an essential element of due process of law. . . .

"Third. But, consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law, and protect the citizen in his private right, and guard him against the arbitrary action of government." ⁷⁹

79. *Twining v. New Jersey* (1908) 211 U.S. 78, 99-100, 29 S.Ct. 14, 53 L.Ed. 97, citations omitted. The court first referred to the rejection of the 14th P & I Clause as safeguarding the self-incrimination

plea, and now took it up under the due process claim, denying it here also. Justice Harlan dissented, feeling that either the P & I or the Due Process Clause covered this right.

These three general principles pertain, of course, to procedural due process, but their general approach may be utilized in substantive due process. They were then elaborated upon by quotations from cases defining due process of law, e. g., "This court has never attempted to define with precision the words. . . . It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard."⁸⁰ Justice Frankfurter's language in 1949 sums up about what the judicial philosophy has been and still is:

"Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights."⁸¹

§ 397. — — The Case-by-Case Approach

Although not then concerned with the "incorporation" question, but having to do with an assessment of realty for the purpose of swamp drainage in New Orleans, Justice Miller wrote, in 1878, that "there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded."⁸² This still continues to be the High Court's approach, whether termed eclectic, pragmatic, or realistic. In effect, the nature of man and the many complexities in his relations with others and with governments, will always limit judges to but a smattering of truth; law "advances by the slow attrition of ignorance and by the constant recognition of its uncertainties."⁸³

80. *Ibid.*, at pp. 101-102.

81. *Wolf v. Colorado*, *supra* note 78, at p. 27, and stating also: "The real clue to the problem confronting the judiciary in the application of the Due Process Clause is not to ask where the line is once and for all to be drawn but to recognize that it is for the Court to draw it by the gradual and empiric

process of 'inclusion and exclusion.'"

82. *Davidson v. New Orleans*, *supra* note 20, at p. 104, quoted in greater detail in § 388. Justice Field also sat upon the bench. See also his language in § 396.

83. *Smyth, This Science Knows—and This it Guesses*, *N. Y. Times*

§ 398. The Bill of Rights—In General—Several Aspects Considered

The Bill of Rights is subjected to many interpretations of which some are contradictory, some are consistent, but most are different. It is not too much to venture that for each bench there are nine different approaches, albeit even ever so slightly different; nor is it too much to venture that on every bench a great deal of individual soul-searching, balancing, and compromising occurs. We do not here attempt the difficult, if not impossible, task of seeking some cord of Ariadne to use in threading our way through the labyrinth of opinions; rather, we discuss a few aspects of the Bill of Rights, and permit the reader to cut his own Gordian knot.

Freedom and liberty: The words "freedom" and "liberty" are found respectively in the 1st and 14th Amendments; do they have the same qualitative definitions? That is, do these two different words have the same meaning? The Supreme Court does not differentiate between the two, and the opinions discuss them interchangeably, but the late Justice Jackson disagreed, and Justice Harlan today apparently agrees with his views.⁸⁴

Absolute and relative: Since "liberty" is also a term which can be interpreted to mean an absolute, unregulated or unqualified, form of thought or activity, the question immediately arises whether this is what is meant by the 14th Amendment's use of the term. Insofar as property and contract rights are concerned, we have seen that these are qualified, and not absolute, rights,⁸⁵ but here we relate this question to the Bill of Rights, and especially and particularly to the 1st Amendment's freedoms. The obvious answer is that the 14th's "liberty" can be interpreted as an absolute, and this approach has been somewhat advocated;⁸⁶ the general, usual, and ordinarily applied view, how-

Magazine, May 13, 1962, p. 16, col. 2.

84. See note 35, *supra*, for the Jackson and Harlan references. At p. 288 of the Jackson reference the Justice also wrote: "The assumption of other dissents is that the 'liberty' which the Due Process Clause of the Fourteenth Amendment protects against denial by the States is the literal and identical 'freedom of speech, or of the press' which the First Amendment forbids only Congress to abridge. The history of criminal libel in America convinces me that the Fourteenth Amendment did not 'incorporate' the First, that the powers of Congress and of the States over

this subject are not of the same dimensions, and that because Congress probably could not enact this law it does not follow that the States may not.

"As a limitation upon power to punish written or spoken words, Fourteenth Amendment 'liberty' in its context of state powers and functions has meant and should mean something quite different from 'freedom' in its context of federal powers and functions."

85. *Supra* note 46 keyed to text.

86. See, e. g., *Prince v. Massachusetts* (1944) 321 U.S. 158, 177, 64 S. Ct. 438, 88 L.Ed. 645, where Jackson (Roberts and Frankfurter

ever, is that "Since in any form of action there is a possibility of collision with the rights of others, there can be no doubt that this freedom to act is not absolute but qualified, being subject to regulation in the public interest which does not unduly infringe this right."⁸⁷ In other words, "the [religious] rights with which we are dealing are not absolutes,"⁸⁸ although they occupy a "high, constitutional position," but must be related to the context within which they appear. As Justice Jackson once observed, in quoting another's words, "The problem, like all those with which we are concerned, is one of balance; too little liberty brings stagnation, and too much brings chaos."⁸⁹

Being admittedly somewhat qualified, therefore, the next question is when, under what circumstances, and to what extent, may qualifications be placed upon these highly prized rights? Or, rather, how can we determine these questions? The balancing test, discussed in § 393 as to property, and also heretofore compared with the clear and present danger test, is applicable. Justice Black has phrased it as follows:

"We are faced in the instant case with the necessity of weighing the conflicting interests of the appellant in the civil rights she claims, as well as the right of the individual house-holder to determine whether he is willing to receive her message, against the interest of the community which by this ordinance offers to protect the interests of all of its citizens, whether particular citizens want that protection or not. The ordinance does not control anything but the distribution of literature, and in that respect it substitutes the judgment of the community for the judgment of the individual householder. It submits the distributor to criminal punishment for annoying the person on whom he calls, even

joining him) concurred and said: "Religious activities which concern only members of the faith [Jehovah's Witnesses] are and ought to be free—as nearly absolutely free as anything can be." See, however, Reed's contrary language (dissenting) in *Marsh v. Alabama*, supra note 67, at p. 512.

See also *Cantwell v. Connecticut* (1940) 310 U.S. 296, 303-304, 60 S. Ct. 900, 84 L.Ed. 987: "Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." See further *Price v. Johnston* (1948) 334 U.S. 266, 285, 68 S.Ct. 1046, 92 L.Ed. 1356, and

Yates v. United States (1957) 354 U.S. 298, 343-344, 77 S.Ct. 1064, 1 L.Ed.2d 1356, where Black and Douglas seemingly advocate absoluteness in free speech.

87. *Jones v. Opelika* (1942) 316 U.S. 584, 618, 62 S.Ct. 1231, 86 L.Ed. 1691, per Murphy, dissenting, with Stone, Black, and Douglas concurring.

88. *Murdock v. Pennsylvania* (1943) 319 U.S. 105, 110, 117, 63 S.Ct. 870, 87 L.Ed. 1292, citing the *Schneider* case, *infra* note 92.

89. *Kunz v. New York* (1951) 340 U.S. 290, 314, 71 S.Ct. 312, 95 L.Ed. 280, dissenting, and quoting Russell, *Authority and the Individual*, p. 25.

though the recipient of the literature distributed is in fact glad to receive it. In considering legislation which thus limits the dissemination of knowledge, we must 'be astute to examine the effect of the challenged legislation' and must 'weigh the circumstances and . . . appraise the substantiality of the reasons advanced in support of the regulation.' " 90

Reasonable alternatives: An absolute prohibition upon a 1st Amendment right is not necessarily bad, depending upon time, place, circumstances, etc., but usually there are one or more alternatives open to the state. For example, in invalidating a milk inspection ordinance because it placed an undue burden upon interstate commerce, the court stated that "It appears that reasonable and adequate alternatives are available." 91 Thus in a street-littering case the court, in 1939, denounced a city's ordinance as a free-speech deprivation, and wrote: "This constitutional protection does not deprive a city of all power to prevent street littering. There are [other] obvious methods of preventing littering. Amongst them [, for example,] is the punishment of those who actually throw papers on the streets." 92 In 1951, however, the court upheld the conviction of a street-corner speaker because "a clear danger of disorder was threatened," whereupon Justice Black, who had dissented in the milk inspection case mentioned above, wrote: "I find it difficult to explain why the Court uses the 'reasonable alternative' concept to protect trade when today it refuses to apply the same principle to protect freedom of speech. For while the 'reasonable alternative' concept has been invoked to protect First Amendment rights, it has not heretofore been considered an appropriate weapon for striking down local health laws." 93

Loss of immunity: The 1st Amendment immunities "may sometimes be lost when they are united with other activities not immune." 94 For example, the owner of a submarine moored it at a state pier and solicited visitors for a stated admission fee; he distributed a circular, on one side printing solely a protest against a city department which had refused him wharfage facilities; on the other side he printed commercial advertising;

90. *Martin v. City of Struthers* (1943) 319 U.S. 141, 143-144, 63 S. Ct. 862, 87 L.Ed. 1313; see also his opinion in the *Marsh* case, *supra* note 67.

91. *Dean Milk Co. v. City of Madison* (1951) 340 U.S. 349, 354, 71 S. Ct. 295, 95 L.Ed. 329.

92. *Schneider v. Town of Irvingtown* (1939) 308 U.S. 147, 162, 60 S.Ct. 146, 84 L.Ed. 155.

93. Respectively, *Feiner v. New York* (1951) 340 U.S. 315, 319, 71 S. Ct. 303, 95 L.Ed. 295, and the *Dean Milk* case, *supra* note 91, at p. 358, citations omitted.

94. *Jones v. Opelika*, *supra* note 87, at p. 608, per Stone. See also § 400, note 142.

the police advised him distribution of the protest would not violate the sanitary code's limitations, but the double-faced bill would; the Supreme Court unanimously upheld the police in refusing to permit this "evasion . . . to achieve immunity from the law's command."⁹⁵

Presumptions: (a) The Bill of Rights: The Bill of Rights, considered as one overall group of rights, all on a plane of equality, each with the others, may nevertheless, as a group, enjoy a greater degree of protection against the federal and state governments than do other rights of persons. For example, the Supreme Court indulges in a presumption that legislation is constitutional, and that attackers must overcome this presumption; but, opined Justice Stone in a famous dictum, "There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."⁹⁶

(b) The First Amendment: This, in effect, is what Justice Jackson had in mind when he wrote that "The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. . . . [F]reedoms of speech and of press, or assembly, and of worship may not be infringed on . . . slender grounds."⁹⁷ To which Justice Frankfurter eventually retorted that, "In short, the claim that any legislation is presumptively unconstitutional which touches the field of the First Amendment and the Fourteenth Amendment, insofar as the latter's concept of 'liberty' contains what is specifically protected by the First, has never commended itself to a majority of this Court."⁹⁸

Preferred position: This aspect of the Bill of Rights is, concededly, somewhat unclear. We must split the first eight Amendments into two groups, one containing only the 1st Amendment rights, and the other containing the rest of the amend-

95. *Valentine v. Christensen* (1942) 316 U.S. 52, 55, 62 S.Ct. 920, 86 L. Ed. 1262.

96. *United States v. Carolene Products Co.* (1938) 304 U.S. 144, 152, 58 S.Ct. 778, 82 L.Ed. 1234; *United States v. C. I. O.* (1948) 335 U.S. 106, 140, 68 S.Ct. 1348, 92 L.Ed. 1849 (dissent of four Justices).

97. *West Virginia State Board of Education v. Barnette* (1943) 319

U.S. 624, 639-640, 63 S.Ct. 1178, 87 L.Ed. 1628. See also the *Schneider* case, *supra* note 92, at p. 162, and also note 98, *infra*.

98. *Kovacs v. Cooper* (1949) 336 U.S. 77, 94-95, 69 S.Ct. 448, 93 L.Ed. 513. See also his exceedingly critical remarks in *Dennis v. United States* (1951) 341 U.S. 494, 526-527, 71 S.Ct. 857, 95 L.Ed. 1137.

ments. This was what we did in the previous subdivision on presumptions. We have already seen that the "total" (Black-Douglas) and "partial" incorporation views of the Supreme Court favor the latter, and that the former has never been accepted by a majority (§§ 394-397). The 1st Amendment, however, admittedly has been "incorporated" by the 14th in all of its clauses, so that here, at least, no problem arises. And, as we saw, the reason was because these were "fundamental" rights. How fundamental are fundamental rights? Put differently, how much value do we place upon speech, etc., compared with the other rights or freedoms in the rest of the Bill of Rights? Are all the Amendments in the Bill of Rights of equal importance in our democratic scheme of things entire, or do we place greater emphasis upon the 1st Amendment freedoms, exalt them even if ever so slightly above the others, and in effect give them a more equal status than the other equals? For example, Cardozo pointed out that certain of the rights found in the first eight amendments could be abolished without violating any principles "of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," e. g., jury trials, indictments, self-incrimination, but

"We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. This is true, for illustration, of freedom of thought and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal. So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action. The extension became, indeed, a logical imperative when once it was recognized, as long ago it was, that liberty is something more than exemption from physical restraint, and that even in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be overridden by the courts." ⁹⁹

99. *Palko v. Connecticut* (1937) 302 U.S. 319, 326-327, 58 S.Ct. 149, 82 L.Ed. 288.

This view of a "different plane of social and moral values" can mean only that more than one plane of values is found in the Bill of Rights, and that in any such deliberate hierarchy there are values higher than others. This merely indicates, however, that of the many rights found in the first eight amendments there are a few which may be placed on a higher plane than the others, and it is only these few which may now be incorporated in the 14th Amendment as a limitation upon the states. Thus several questions may be propounded: (1) Has Cardozo said that this higher set of values cannot be broadened? (2) Is this group preferred as against the other rights in the first eight amendments, and to be treated more deferentially, and receive greater protections? (3) Are the 1st Amendment rights to receive any preferred position as against all other incorporated, as well as the non-incorporated, rights? (4) Regardless, are the 1st Amendment rights to receive a preferred position as against property rights? (5) Within the 1st Amendment there are several rights; is any one of these to be given a still more preferred position over the others, so that an hierarchy within the 1st Amendment is also to be created? Cardozo has not answered any of these questions, but are there any answers given by the other or later Justices?

The answer is that not only will we find many such answers and opinions and views, but we also will discover many disagreements. We list a sampling, to an extent sufficient to permit an understanding of the problem involved, but note a *caveat*, namely, that no clear-cut demarcation is made as to exactly what the preferment is, or to what extent it should be so granted if at all, and, even more importantly, exactly what it is which should be preferred, that is, whether the entire Bill of Rights should receive preferential treatment, whether it should be only the 1st Amendment, or whether no different treatment should be accorded to any amendment or constitutional provision. Our sampling is a chronological one.

In 1942 Chief Justice Stone felt that "the Constitution, by virtue of the First and Fourteenth Amendments, has put those freedoms [of speech and religion] in a preferred position;" Justice Murphy felt that "Where regulation or infringement of the liberty of discussion and the dissemination of information and opinion are involved, there are special reasons for testing the challenged statute on its face;" and Justice Black felt that "The First Amendment does not put the right freely to exercise religion in a subordinate position."¹⁰⁰ The following year Murphy felt "that nothing enjoys a higher estate in our society than the right given by the First and Fourteenth Amend-

100. Jones v. Opelika, *supra* note 87,
at pp. 608, 615, 624.

ments freely to practice and proclaim one's religious convictions,"¹⁰¹ but nine months later Justice Rutledge expressed the views of the majority that "it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme. All are there interwoven."¹⁰² Less than two months later a majority felt that "The exaction of a tax as a condition to the exercise of the great" liberty (there) of religion, was "as obnoxious as the imposition of a censorship or a previous restraint," whereupon a dissenting three challenged the others, because "If the First Amendment grants immunity from taxation to the exercise of religion, it must equally grant a similar exemption to those who speak and to the press."¹⁰³ In 1945 Justice Rutledge denounced a state law requiring a union leader to obtain an organizer's card before speaking at a meeting where he solicited membership, and spoke of "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. . . . All these, though not identical, are inseparable. They are cognate rights, and therefore are united in the First Article's assurance."¹⁰⁴ The following year Justice Black (speaking in a majority opinion but only for three others) felt that "When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, . . . we remain mindful of the fact that the latter occupy a preferred position," and in a concurrence Frankfurter referred to a prior decision according "the purveyors of ideas . . . 'a preferred position,'" seemingly adopted it, or at least the holding, and concluded that "Constitutional privileges having such a reach" should not be limited in that case.¹⁰⁵ By 1948 a town's loud-speaker ordinance was denounced, the majority holding it was a "previous restraint on the right of free speech," and then stating "we must give freedom of speech in this case the same preferred treatment that we gave freedom of religion in the *Cantwell Case*, freedom of the press in the *Griffin Case*, and freedom of speech and assembly in the *Hague Case*,"¹⁰⁶ although within approximately a year another loud-speaker ordinance was upheld.¹⁰⁷

101. The *Martin case*, *supra* note 90, at p. 149, concurring, with Douglas and Rutledge joining him.

102. The *Prince case*, *supra* note 86, at p. 164, citations omitted. Murphy dissented.

103. *Follett v. Town of McCormick* (1944) 321 U.S. 573, 577, 581-582, 64 S.Ct. 717, 88 L.Ed. 938.

104. *Thomas v. Collins* (1945) 323 U.S. 516, 530, 65 S.Ct. 315, 89 L.Ed. 430.

105. *Marsh v. Alabama*, *supra* note 67, respectively at p. 509, citing the *Jones*, *Murdock*, and *Follett cases*, *supra* notes 87, 88, and 103, and at p. 510.

106. *Saia v. New York* (1948) 334 U.S. 558, 559-560, 561, 68 S.Ct. 1148, 92 L.Ed. 1574, although see note 138, *infra*.

107. The *Kovacs case*, *supra* note 98, and see note 138, *infra*.

This preceding chronology shows somewhat of the steadily accelerating (minority) march to the preferred position camp, although opposing (majority) views had been offered. For example, in 1948 the fact that such a division did exist was seen when four Justices inveighed against "legislative intrusion into these [1st Amendment] domains," against granting Congressional legislation "the same weight and presumptive validity in placing limits upon the freedoms as attaches in their favor in other connections," and concluded that "Accordingly, the usual preeminence accorded to the First Amendment liberties disappears. . . ."¹⁰⁸ Was this an admission of such a minority status? The following year, in the loud speaker case just mentioned, Justice Reed's opinion upholding the ordinance referred to "The preferred position of freedom of speech," which prompted Frankfurter, whose vote was required to make up the majority, to write:

"This is a phrase that has uncritically crept into some recent opinions of this Court. I deem it a mischievous phrase, if it carries the thought, which it may subtly imply, that any law touching communication is infected with presumptive invalidity. It is not the first time in the history of constitutional adjudication that such a doctrinaire attitude has [occurred] . . . I say the phrase is mischievous because it radiates a constitutional doctrine without avowing it. Clarity and candor in these matters, so as to avoid gliding unwittingly into error, make it appropriate to trace the history of the phrase 'preferred position.'"¹⁰⁹

The Justice's chronological accounting is not identical with that heretofore given, but this does not matter. He felt that

"Behind the notion sought to be expressed by the formula as to 'the preferred position of freedom of speech' lies a relevant consideration in determining whether an enactment relating to the liberties protected by the Due Process Clause of the Fourteenth Amendment is violative of it. In law also, doctrine is illuminated by history. The ideas now governing the constitutional protection of freedom of speech derive essentially from the opinions of Mr. Justice Holmes . . . [who] was far more ready to find legislative invasion where free inquiry was involved than in the debatable area of economics. . . . The objection to summarizing this line of thought by the phrase 'the preferred position of freedom of speech' is that it expresses a complicated process of constitutional adjudication by a deceptive formula. And

108. *United States v. C. I. O.* (1948) 335 U.S. 106, 140, 141, 68 S.Ct. 1349, 92 L.Ed. 1849.

109. *The Kovacs case*, supra note 98, at p. 90. The two quotations below are at pp. 95-96 and 106, respectively.

it was Mr. Justice Holmes who admonished us that 'To rest upon a formula is a slumber that, prolonged, means death.' "

To all of this Justice Rutledge replied that

"I think my brother Frankfurter demonstrates the conclusion opposite to that which he draws, namely, that the First Amendment guaranties of the freedoms of speech, press, assembly and religion occupy preferred position not only in the Bill of Rights but also in the repeated decisions of this Court."

Just five months after this exchange Justice Jackson, in an unreasonable search and seizure case (§§ 337, 340, 424-426), wrote that "When this Court recently has promulgated a philosophy that some rights derived from the Constitution are entitled to a 'preferred position,' . . . I have not agreed. We cannot give some constitutional rights a preferred position without relegating others to a deferred position; we can establish no first without thereby establishing seconds. Indications are not wanting that Fourth Amendment freedoms are tacitly marked as secondary rights, to be relegated to a deferred position."¹¹⁰

Two years later it appeared that the apogee of the preferred position influence had long since been reached and was now a lost cause. Justice Frankfurter now referred to "Some members of the Court—and at times a majority—[who] have . . . suggested, with the casualness of a footnote, that such legislation [restricting 1st Amendment freedoms] is not presumptively valid, and it has been weightily reiterated that freedom of speech has a 'preferred position' among constitutional safeguards. The precise meaning intended to be conveyed by these phrases need not now be pursued."¹¹¹ To which Justice Black replied that under the then-present conditions of public opinion there would be few to protest the convictions, but "There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society." That same day, however, but in another case, Justice Black (with Douglas concurring) dissented and apparently conceded defeat: "Today's decision marks a revitalization of the judicial views which prevailed before this Court embraced the philosophy that the First Amendment gives a preferred status to the liberties it protects. I adhere to that preferred position philosophy."¹¹² Thus, in 1956, writing for five other members of

110. *Brinegar v. United States* (1949) 338 U.S. 160, 180, 69 S.Ct. 1302, 93 L.Ed. 1879.

111. The *Dennis* case, *supra* note 98, at pp. 526-527, concurring. The quotation following is at p. 581.

112. *Breard v. City of Alexandria* (1951) 341 U.S. 622, 650, 71 S.Ct. 920, 95 L.Ed. 1233 (majority upholding a peddler ordinance requiring them to be requested to call before seeking admittance). See fur-

the court, Frankfurter could say: "As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion." ¹¹³

§ 399. — In Particular—1st Amendment—Establishment of Religion

There are two express guarantees given to the individual, namely, that neither the federal (see § 328) nor the state government (14th Amendment) ¹¹⁴ may establish an official religion or church which Americans must accept or support, or to whose precepts they must subscribe, in other words, "The First Amendment has erected a wall between church and state;" ¹¹⁵ and, secondly, every person is guaranteed freedom to practice his faith as he chooses. ¹¹⁶

The Supreme Court has ruled against the giving of any state assistance to religious causes, even though it may be nondiscriminatory as between different faiths; it is, however, permissible for public schools to release students, at their request, from one hour each week of class time so as to attend their own churches for religious instruction. ¹¹⁷ States may also provide

ther on the above analysis by Mason, *The Core of Free Government*, etc., 65 *Yale L.Jl.* 597 (1956) where Prof. Mason discusses naturalization and other cases; at p. 625 he refers to Jackson's remarks in the *Barnette* case, *supra* note 97, and concludes that with these words Jackson now, "for a time," made up a majority in favor of the preferred position group. I do not believe this did occur, for Jackson was agreeing only to incorporate the 1st Amendment as a standard for the 14th, and this did not necessarily mean he felt them preferred, as his text comments keyed to note 110, *supra*, indicate he did not subscribe to any preferred-deferred dichotomy. Further, his words might also be interpreted to speak on presumptions only, e. g., quotation keyed to note 97, *supra*.

¹¹³. *Ullmann v. United States* (1956) 350 U.S. 422, 428, 76 S.Ct. 497, 100 L. Ed. 511. Justice Reed concurred except as to this particular sentence (at pp. 339-340) and Douglas (Black concurring) dissented from the entire holding and opinions.

¹¹⁴. See, e. g., *Cantwell v. Connecticut* (1940) 310 U.S. 296, 60 S.Ct.

900, 84 L.Ed. 1213, *Palko v. Connecticut* (1937) 302 U.S. 319, 325, 58 S.Ct. 149, 82 L.Ed. 288, thereby in effect overturning *Permoli v. Municipality, etc.* (1845) 3 How. 589, 11 L.Ed. 739, when the 14th Amendment was not available.

¹¹⁵. *Saia v. New York*, *supra* note 106, at pp. 559-560, although much questioned, see note 138, *infra* for citations.

¹¹⁶. Even to the extent of sending his children to a parochial school despite a state law requiring attendance at public schools. *Pierce v. Society of Sisters* (1925) 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070.

¹¹⁷. *Zorach v. Clauson* (1952) 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954, although in *Illinois ex rel. McCollum v. Board of Education* (1948) 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 249, under the Establishment Clause, a system was held bad under which the law compelled children to go to school, freed them during school hours on condition they attend religious classes, which were held in the school buildings and taught by sectarian teachers (not employed or paid for by the Board).

free school books¹¹⁸ and free bus transportation to children attending parochial schools if also furnished to those in public schools, but a non-denominational prayer in public schools is denounced.¹¹⁹ The Court has reversed itself within three years and held it to be unconstitutional to exclude children from public schools because of their refusal to salute the American flag when this violated their religion,¹²⁰ although religion cannot be used as a cover-up to compel a minor to work in defiance of state child labor laws.¹²¹ States may designate Sunday as a day of rest, and

118. *Cochran v. Louisiana Board of Education* (1930) 281 U.S. 370, 50 S. Ct. 335, 74 L.Ed. 913.

119. *Everson v. Board of Education* (1947) 330 U.S. 1, 67 S.Ct. 504, 91 L. Ed. 711. In a dissent shared by three others, Rutledge disagreed as to the meaning of the 1st Amendment's language. "It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." At pp. 31-32. A state's constitution, of course, controls its own desires for bus aid, as in Wisconsin, where it was denounced as unconstitutional. *State ex rel. Reynolds v. Nusbaum* (1962) — Wis. —, 115 N.W.2d 761.

On the prayer, see *Engel v. Vitale* (1962) 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601. There the Board of Education directed "the following prayer to be said aloud by each class in the presence of a teacher at the beginning of each school day: 'Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country.'" At p. 422. Justices Frankfurter and White did not participate; Justice Black delivered the majority opinion, with Douglas concurring separately and Stewart being the lone dissenter. Thus a definite majority of six Justices agreed upon the voiding of the prayer. In *Chamberlin v. Dade County Board of Public Instruction* (1962) 143 So.2d 21, 30, there was a compulsory "daily reading of the Bible without sectarian comment," and pupils could be excused; the statute was upheld on June 6, 1962 and the *Engel* decision in the New York courts was cited and quoted; that decision (*Engel*) was reversed (*supra*) on

June 25th, but the Florida court denied rehearing on July 31st.

On bible reading, see *Doremus v. Board of Education* (1952) 342 U.S. 429, 72 S.Ct. 394, 96 L.Ed. 475 (dismissing suit as plaintiffs had no standing), *Schempp v. School District, etc.* (E.D.Pa.1959) 177 F.Supp. 398 (denouncing it); and the *Chamberlin v. Dade County case, supra* (upholding it); see also *Tudor v. Board of Education* (1953) 14 N.J. 31, 100 A.2d 857 (refusing to permit bible distribution in schools). Cases are now (fall, 1962) going up on recitation of Bible verses and the Lord's Prayer, e. g., *Abington School Dist. v. Schempp* (*supra*), cert. gr. (1962) — U.S. —, — S.Ct. —, — L.Ed.2d —.

120. In *Minersville School District v. Gobitis* (1940) 310 U.S. 586, 60 S. Ct. 1010, 84 L.Ed. 1375, the court, with only Stone dissenting, held to the contrary of the statement; two years later, in a dissent to *Jones v. Opelika, supra* note 87, at pp. 623-624, three Justices wrote that "we now believe that it was" wrongly decided; and the following year, with only three dissents, the court reversed the *Gobitis* case and rejected compulsory salutes to the flag. The *Barnette* case, *supra* note 97. In *Taylor v. Mississippi* (1943) 319 U.S. 583, 63 S.Ct. 1200, 87 L.Ed. 1600, a statute punishing one who teaches resistance to saluting the flag was denounced.

121. The *Prince* case, *supra* note 86. Religious scruples cannot prevent a child from receiving a blood transfusion where his life is in danger, even though his parents refuse to sign an authorization therefor, on the ground that their religion rejects this. *Perricone v. Finn* (1962) 37 N.J. 463, 181 A.2d 751; *Santos v. Goldstein* (1962) 16 A.D.2d 755, 227 N.Y.S.2d 450.

this despite other days of the week being holy ones for other faiths.¹²² "The exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious as the imposition of a censorship or a prior restraint."¹²³ So, too, is it obnoxious for a company-owned town to refuse to permit the distribution of religious literature,¹²⁴ or for a town to prevent church services of one religion in a public park where others were permitted there,¹²⁵ or the use for religious exhortation of a loud-speaker in a public park, holding the latter ordinance unconstitutional on its face as a previous restraint.¹²⁶ The types of licensing denounced in § 400 are applicable here also, as a previous restraint.¹²⁷

§ 400. — — — Freedom of Speech

Freedom of speech is constitutionally protected under the 14th Due Process Clause.¹²⁸ It is "not limited to the Blackstonian idea that freedom of the press means only freedom from restraint prior to publication,"¹²⁹ and with freedom of "press has broad scope This freedom embraces the right to distribute literature, and necessarily protects the right to receive it."¹³⁰ These two freedoms, that is, of speech and of press, are closely coupled in fact and in opinions to the point where almost an identity appears in approach.

The general rule is to permit free expression of opinions, but this does not mean that an absolute right is held. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting'

On Sunday laws, i. e., requiring stores to be closed, save for certain types, on the seventh day of the week, see *Fass v. New Jersey* (1962) 370 U.S. 47, 82 S.Ct. 1167, 8 L.Ed. 2d 398, refusing to review a conviction of an Orthodox Jew who observed the Sabbath on Saturday and desired to remain open on Sunday.

122. See Chapter XX, note 84, *infra*, for citations.

123. The *Follett* case, *supra* note 103, at p. 577, citations omitted.

124. The *Marsh* case, *supra* note 67.

125. *Fowler v. Rhode Island* (1953) 345 U.S. 67, 73 S.Ct. 526, 97 L.Ed. 828, although see *Poulos v. New Hampshire* (1953) 345 U.S. 395, 73 S.Ct. 760, 97 L.Ed. 1105, where appropriate civil proceedings to ob-

tain a license existed, and no discrimination was present.

126. The *Saia* case, *supra* note 106, at pp. 559-560, although much questioned, see note 138, *infra*, for citations.

127. The *Kunz* case, *supra* note 89.

128. *Gitlow v. New York* (1925) 268 U.S. 652, 666, 45 S.Ct. 625, 69 L. Ed. 1138; the *Palko* case, *supra* note 114; see also *Whitney v. California* (1927) 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (including Brandeis' concurrence).

129. *Chaplinsky v. New Hampshire* (1942) 315 U.S. 568, 572, fn. 3, 62 S.Ct. 766, 86 L.Ed. 1031, citing the *Near* case, *infra* note 143.

130. The *Martin* case, *supra* note 90, at p. 143.

words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”¹³¹ Thus these items just mentioned are not protected where they damage or tend to cause the said breach.¹³²

The “clear and present danger” test, and the “balancing” test, have been examined in § 329. These are used to determine the constitutionality of restrictions by the state or its officials. As Brandeis in 1927 pointed out, however, “although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral. . . . The legislature must obviously decide, in the first instance, whether a danger exists which calls for a particular protective measure. . . . This court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgment of free speech and assembly as the means of protection.”¹³³ So, too, where questions of security, on a state level, are involved, is there a balancing of rights, duties, and responsibilities of the state and the individual, over as against the harm, disability, and danger not alone to the individual and to the state directly but also to the latter’s democratic institutions and the very reason for its existence, that is, to protect life, liberty, and the pursuit of happiness.¹³⁴ In any such evaluation certain factors must be taken into account, for example:

“(1) What is the interest deemed to require the regulation of speech?

131. The Chaplinsky case, *supra* note 129, at pp. 571–572, per Murphy, for an unanimous court. In this case the conviction of a Jehovah’s Witness’ follower was upheld when, upon arrest, he said to the officer, “you are a God damned racketeer,” and “a damned Fascist,” etc. See also the dissent by Douglas in the Dennis case, *supra* note 98, at p. 585.

132. See, e. g., the *Feiner* case, *supra* note 93.

133. The *Whitney* case, *supra* note 128, at pp. 374–377. On out-of-court statements as contempt of court, see *Wood v. Georgia* (1962) 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (by a sheriff questioning advisability of grand jury investigation, held not punishable under the circumstances there).

134. See, e. g., *American Communications Ass’n, C. I. O. v. Douds* (1950) 339 U.S. 382, 394–395, 70 S.Ct. 674, 94 L.Ed. 925.

Questions as to “subversive” persons and activities arise under free speech, and also as to a refusal to answer questions of an authorized investigating committee; see, on this, *Sweezy v. New Hampshire* (1957) 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed.2d 1311; *Uphaus v. Wyman* (1959) 360 U.S. 72, 79 S.Ct. 1040, 3 L.Ed.2d 1090, also permitting a state to protect its own interests regardless of the federal preemption of laws to punish sedition in *Pennsylvania v. Nelson* (1956) 350 U.S. 497, 76 S.Ct. 477, 100 L.Ed. 640; *Scull v. Virginia ex rel. Committee, etc.* (1959) 359 U.S. 344, 79 S.Ct. 838, 3 L.Ed.2d 865; *Raley v. Ohio* (1959) 360 U.S.

"(2) What is the method used to achieve such ends as a consequence of which public speech is constrained or barred?"

"(3) What mode of speech is regulated?"

"(4) Where does the speaking which is regulated take place?" ¹³⁵

Censorship through official approval or licensing ¹³⁶ in advance of speaking is condemned, and a person may speak on the public streets freely, ¹³⁷ although not when a loud and raucous amplifier is used near a hospital, ¹³⁸ or when he is likely to interfere with the proper movement of pedestrians and traffic. Restrictions upon the scope of speech are upheld in certain instances, e. g., political limitations upon governmental employees, or those who seek to overthrow the government by force and violence. ¹³⁹

423, 79 S.Ct. 1257, 3 L.Ed.2d 1344; *Nelson and Globe v. County of Los Angeles* (1960) 362 U.S. 1, 80 S.Ct. 527, 4 L.Ed.2d 494.

As to loyalty oaths, see, e. g., *Wiemann v. Updegraff* (1952) 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (rejecting it); *Garner v. Board of Public Works, etc.* (1951) 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317 (upholding it) and on federal-state conflict, see § 314.

135. *Niemotko v. Maryland* (1951) 340 U.S. 268, 282, 71 S.Ct. 325, 95 L.Ed. 269, per Frankfurter, concurring. Only his opening questions have been used.

136. See, e. g., the denunciation of the lack of any standards in the license-issuing of permits to speak, in the *Niemotko* case, *supra* note 135, at p. 273.

137. Even in a company-owned town, the *Marsh* case, *supra* note 67.

138. See, however, the *Saia* case, *supra* note 106, at pp. 559-560, permitting the use of a loud-speaker in a public park and denouncing an ordinance as "unconstitutional on its face, for it establishes a previous restraint on the right of free speech" However, in the *Kovacs* case, *supra* note 98, four Justices definitely desire to overturn the *Saia* case (see pp. 97-98), and undoubtedly Justice Murphy would have joined, although this is problematical; regardless, the *Saia* case is not left "intact." The

Niemotko case, *supra* note 135, at p. 280.

139. In the *Niemotko* case, *supra* note 135, at pp. 276-281, Frankfurter's concurrence classified the free speech cases as: (1) those in which the community's only interest was in keeping the streets clean, but this could not prevent issuing handbills, etc.; (2) solicitation, where a fraud upon the public was feared, but even here religious and union efforts were upheld; (3) the sale of religious literature, which was upheld; (4) the door-bell approach, to prevent crime, which was denounced when applied to religious groups; (5) the child labor case, where religion was held insufficient to permit this; (6) control of speeches in streets and parks, for the public's benefit: (a) upheld as "a proper regulation of the use of public grounds," although denounced where sought to be used to suppress free speech arbitrarily, and not permitted a wide, unlimited, over-discretionary latitude; (b) sound trucks, once permitted for a religious group in or near a park, and once somewhat denounced where "loud and raucous" noises were the result; (c) post-speech sanctions, rather than control through licensing, denounced and upheld depending upon circumstances; (7) a breach of the peace in a private building, denounced because of the instructions to the jury.

The speech concept was early coupled with picketing, beginning with Brandeis' assumption in 1937, its adoption by the Supreme Court in 1940, and its mushrooming into almost an absolute right to picket under any and all circumstances, until a halt was called in 1949.¹⁴⁰ This identification of free speech and picketing may be better understood if picketing is atomized, that is, broken into its discrete portions, whereupon we can see that only a few of the many items which go into the make-up of this activity may be so identified or coupled; only these few are now entitled to the protections of free speech and free press.¹⁴¹ But even then, when these ordinarily protected few items are so inextricably intertwined with bad ones, e. g., violence, and these bad must be prevented, then the good must go down the drain with the bad, that is, the ordinarily protected free speech items may now be restrained.¹⁴²

§ 401. — — — Freedom of Press

Freedom of the press is within the protections afforded by due process¹⁴³ and is generally coupled with free speech (§§ 329–330). It is essential that we have “an untrammelled press as a vital source of public information,”¹⁴⁴ but this freedom is not limited to the prevention of prior restraints (§ 400); the freedom goes beyond this, and encompasses the same degree of protection accorded to speech, religion, and assembly. But as with these others, so with the press—there are no absolutes, so that “Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it,”¹⁴⁵ as we also saw occur with speech (§ 400).

Freedom to print and to publish thus may be made subject to responsibility at law, e. g., a libel damage suit, and when this is

140. *Senn v. Tile Layers Union* (1937) 301 U.S. 468, 478, 57 S.Ct. 857, 81 L.Ed. 1229; *Thornhill v. Alabama* (1940) 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; *Giboney v. Empire Storage & Ice Co.* (1949) 336 U.S. 490, 498, 501, 69 S.Ct. 684, 93 L.Ed. 834. See also *International Brotherhood of Teamsters, AFL v. Vogt, Inc.* (1957) 354 U.S. 284, 294, 77 S.Ct. 1166, 1 L.Ed.2d 1347, esp. dissenting opinion's criticism of the “full circle” treatment.

141. See Forkosch, *An Analysis and Re-Evaluation of Picketing in Labor Relations*, 26 *Fordham L.Rev.* 391–440 (1957) where this is done.

142. *Ibid.*, at pp. 429–431, and see *Milk Wagon Drivers Union v.*

Meadowmoor Dairies, Inc. (1941) 312 U.S. 287, 293, 294, 61 S.Ct. 552, 85 L.Ed. 836, and *Busch Jewelry Co. v. United Retail Employees Union* (1939) 281 N.Y. 150, 22 N.E.2d 320.

143. *The Gitlow case*, *supra* note 128; *Near v. Minnesota* (1931) 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357; the *Palko case*, *supra* note 99.

144. *Grosjean v. American Press Co.* (1936) 297 U.S. 233, 250, 56 S.Ct. 444, 80 L.Ed. 660.

145. *Roth v. United States* (1957) 354 U.S. 476, 514, 77 S.Ct. 1304, 1 L.Ed.2d 1498, per Douglas (Black concurring) dissenting.

available there can be no prior restraint upon publication.¹⁴⁶ Regardless, a criminal "group libel" statute may be upheld as against free speech claims provided, of course, no other defect is present, e. g., vagueness,¹⁴⁷ and states may invoke a "limited injunctive remedy" to prevent the sale and distribution of material found after due notice and trial to be obscene.¹⁴⁸ Obscenity is punishable, and the protections accorded a free press do not permit such literature or publications,¹⁴⁹ but obscenity is not to be confused with sex. "Obscene material is material which deals with sex in a manner appealing to prurient interest."¹⁵⁰ Since it is a vague term, and necessarily a subjective matter, there is a possibility that a statute which makes punishable "incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment,"¹⁵¹ unless, perhaps, "cured by an opinion of the state court, confining" and limiting it.¹⁵² Thus the obscene which does not sink below a minimum (which, of course, is judge-determined) is "as much entitled

146. The *Near* case, *supra* note 143, at p. 713. Justice Black, however, has expressed the view that the 1st Amendment prevents even a libel suit, i. e., an absolutistic concept of freedom of speech. *New York Times*, June 11, 1962, p. 1, col. 2, 37 N.Y.U.L.R. 549, 553-554 (1962).

147. *Beauharnais v. Illinois* (1952) 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 620.

148. *Kingsley Books, Inc. v. Brown* (1957) 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469.

149. In the *Roth* case, *supra* note 145, at pp. 481, 485, the court said that this was "the first time the question [whether obscenity is constitutionally protected] has been squarely presented to this Court," and the answer was "that obscenity is not within the area of constitutionally protected speech or press." In *Winters v. New York* (1948) 333 U.S. 507, 518, 68 S.Ct. 665, 92 L.Ed. 840, the court felt that statutory terms like "obscene," "lewd," "lascivious," "filthy," "indecent," and "disgusting," have a "permissible uncertainty;" in the *Roth* case, *supra* note 145, at p. 491, the federal statutory terms were "obscene, lewd, lascivious, or filthy . . . or other publication of an indecent character," and the California terms were "obscene and indecent."

These terms were not denounced although both dissenting opinions felt otherwise.

In order to punish a bookseller for retailing obscene literature there must be "scienter—knowledge by appellant [bookseller] of the contents of the book," else a constitutional violation occurs. What "sort of mental element is requisite to a constitutionally permissible prosecution," or "whether honest mistake" may be pleaded, or "whether there might be circumstances" requiring the bookseller himself to investigate, are matters the Supreme Court has not yet passed upon; it holds scienter required. *Smith v. California* (1959) 361 U.S. 147, 149, 154, 80 S.Ct. 215, 4 L.Ed.2d 205.

150. The *Roth* case, *supra* note 145, at p. 487. (Of course this standard is also sufficiently vague so as to be castigated under the void for vagueness rule.)

151. The *Winters* case, *supra* note 149, at p. 509, citing *Stromberg v. California* (1931) 283 U.S. 359, 369, 51 S.Ct. 532, 75 L.Ed. 1117, and *Herndon v. Lowry* (1937) 301 U.S. 242, 258, 57 S.Ct. 732, 81 L.Ed. 1066.

152. The *Winters* case, *supra* note 149, at pp. 510, 519-520, holding the court's efforts so to do were insufficient. See Frankfurter's reply, at pp. 524-525.

to the protection of free speech as the best of literature,"¹⁵³ although pornography of a "hard core" nature certainly does not come within constitutional guarantees. But this does not necessarily mean that only such obscenity is denounced; the term, however, is apparently given a narrow meaning, and the test to be applied is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."¹⁵⁴

Motion pictures are treated as free speech and press are, so that standards like "sacrilegious," in a licensing statute, are condemned.¹⁵⁵ Radio and television, subject to federal licensing initially, thereafter do exercise all of the rights guaranteed by the 1st Amendment in this connection. Liability for abuse of this right, e. g., a libel suit, attaches, as with the press, to this medium.¹⁵⁶

§ 402. — — — Peaceably to Assemble and Petition

The constitutional guaranty¹⁵⁷ is not merely to assemble,¹⁵⁸ but also to assemble for the purposes of political activity,¹⁵⁹ religious services,¹⁶⁰ union meetings,¹⁶¹ etc., and for these and other peaceful purposes the right to organize¹⁶² and to assemble is pro-

153. *Ibid.*, at p. 510.

154. The Roth case, *supra* note 145, at p. 489. See also the Martin case, *supra* note 90, at p. 155 (Reed dissented). On non-mailability because of (indirect) obscenity, see § 253, note 32, and § 329.

155. Joseph Burstyn, Inc. v. Wilson (1952) 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098.

156. The major problem is whether a station is absolutely liable, or whether it must also be at fault, where a speaker on radio or T. V. libels another. The latter is the majority rule. *Summit Hotel Co. v. N. B. C.* (1939) 336 Pa. 182, 8 A. 2d 302, but cf. *Sorenson v. Wood* (1932) 123 Neb. 348, 243 N.W. 82, app. dism. sub. nom. *KFAB Broadcasting Co. v. Sorenson* (1933) 290 U.S. 599, 54 S.Ct. 209, 78 L.Ed. 527.

157. See, e. g., the Palko case, *supra* note 114.

158. In *DeJonge v. Oregon* (1937) 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278, the statute did not make membership in the Communist Party illegal, nor did it outlaw the Party, and the "sole offense" for which *DeJonge* was convicted "was that

he had assisted in the conduct of a public meeting, albeit otherwise lawful, which was held under the auspices of the Communist Party." At p. 362. The Supreme Court reversed.

159. See, e. g., *United States v. Cruikshank* (1875) 92 U.S. 542, 552, 23 L.Ed. 588, "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." See also discussion in the *DeJonge* case, *supra* note 158, at p. 362 et seq. However, the federal government is able to require, as a condition of employment, that its officers and employees in the executive branch (with exceptions) refrain from political activities. *United Public Workers v. Mitchell* (1947) 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754.

160. See, e. g., the *Saia* case, note 106.

161. *Thomas v. Collins* (1945) 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 431.

162. See, e. g., the *Zimmerman*, *DeJonge*, and *Collins* cases, *supra* notes 158, 161, and 163, *infra*.

tected.¹⁶³ Unreasonable restrictions upon these meetings cannot be imposed but reasonable ones, e. g., to prevent fire, a hazard to health, or a traffic obstruction, may be imposed. "The privilege of a citizen of the United States to use the streets and parks for the communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."¹⁶⁴

The right to petition may be exercised privately or publicly, e. g., one may write a letter directly to a legislator or another, or may assemble with others to speak on and discuss the matter, as above set forth.

§ 403. — — 2d Amendment—Bear Arms

This has become an innocuous right, for not alone is it not protected as against the state,¹⁶⁵ but both the state and federal governments are upheld in legislating against the carrying of concealed weapons, requiring the registration of firearms, and limiting their sale and interstate transportation.¹⁶⁶ There is, of course, a corollary to this right, namely, a duty to bear arms in time of war.¹⁶⁷

§ 404. — — 3d Amendment—Quartering of Soldiers

This amendment has been examined in § 333 and is a limitation solely upon the federal government. However, if a state were to attempt so to quarter the state militia there is no question but that it would not directly have this authority, in time of war or of peace, and could be prevented from so doing. Federal legislation authorizing this state action, and in effect delegating this power to the states, to be exercised under controlled situations, when the

163. In *New York ex rel. Bryant v. Zimmerman* (1928) 278 U.S. 63, 72, 49 S.Ct. 61, 73 L.Ed. 184, a statute requiring associations of twenty or more persons, requiring an oath as a condition of membership, to file its constitution, etc. with a state official, was upheld as against a due process contention "that it prevents him from exercising his right of membership in the association. But his liberty in this regard, like most other personal rights, must yield to the rightful exertion of the police power."

164. *Hague v. C. I. O.* (1939) 307 U.S. 496, 516, 59 S.Ct. 954, 83 L.Ed. 1423; thereafter approved by a

majority in the *Saia* case, *supra* note 106, at p. 561, fn. 2.

165. *Presser v. Illinois* (1886) 116 U.S. 252, 6 S.Ct. 580, 29 L.Ed. 615; *United States v. Miller* (1939) 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206.

166. See, e. g., the *Cruikshank* case, *supra* note 159, at p. 553, *Robertson v. Baldwin* (1897) 165 U.S. 275, 282, 17 S.Ct. 326, 41 L.Ed. 715. See § 332 for citations, etc.

167. See, e. g., *Arver v. United States* (1918) 245 U.S. 366, 38 S.Ct. 159, 62 L.Ed. 349.

federal government itself has this power, would undoubtedly be upheld.

§ 405. — — 5th Amendment—Eminent Domain

The limitation against any taking except for a public use,¹⁶⁸ and then with the requirement that just compensation be paid, applies to the states through the due process clause, just as well as against the federal (see § 336). As there, so here, a reasonable exercise of the state's police power, where the regulation does not go so far as to be held to be a taking, permits outright condemnation or a complete impairment of property without any compensation, e. g., zoning ordinances, laws preventing subsidence of the surface of property, nuisances, choosing between two or more properties where no alternative exists, fixing minimum wellhead prices on all gas taken from a single field.¹⁶⁹ The Supreme Court recently upheld the power of a town to forbid sand and gravel mining below its water table even though all mining was thereby rendered impossible.¹⁷⁰ A state may even delegate its power to condemn to a private corporation, where the public interest and welfare is benefited and where little, if any, damage to another's property is occasioned.¹⁷¹

168. On this see, e. g., *Jones v. City of Portland* (1917) 245 U.S. 217, 38 S.Ct. 112, 62 L.Ed. 252, upholding the city's appropriation to construct a coal and fuel yard to sell at cost; see also *Green v. Frazier* (1920) 253 U.S. 233, 40 S.Ct. 499, 64 L.Ed. 878 (state may operate bank, warehouse, etc.)

169. *Hadacheck v. Sebastian* (1915) 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348; *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322; *Reinman v. Little Rock* (1915) 237 U.S. 171, 35 S.Ct. 511, 59 L.Ed. 910; *Miller v. Schoene* (1928) 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568; *Cities Service*

Gas Co. v. Peerless Oil & Gas Co. (1950) 340 U.S. 179, 71 S.Ct. 215, 95 L.Ed. 190; although cf. *Thompson v. Consolidated Gas Utilities Corp.* (1937) 300 U.S. 55, 57 S.Ct. 364, 81 L.Ed. 510.

170. *Goldblatt v. Town of Hempstead* (1962) 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130.

171. *Clark v. Nash* (1905) 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085, *Strickley v. Highland Boy Gold Mining Co.* (1906) 200 U.S. 257, 26 S.Ct. 301, 50 L.Ed. 581; see also *Head v. Amoskeag Mfg. Co.* (1885) 113 U.S. 9, 5 S.Ct. 441, 28 L.Ed. 889.

Chapter XIX

THE DUE PROCESS CLAUSE—PROCEDURAL

§ 410. Introductory

"The history of American freedom is, in no small measure, the history of procedure," and "in the development of our liberty insistence upon procedural regularity has been a large factor."¹ Procedural safeguards thus "protect the citizen in his private right and guard him against arbitrary action of government."² It does not matter what the merits involve, or what they show; regardless of innocence or guilt, any person is entitled to at least the fundamentals of a fair procedure. Thus, as the New York Court of Appeals phrased it, it has "refused 'to announce a doctrine that the fundamentals of a fair trial need not be respected if there is proof in the record to persuade us of defendant's guilt.'"³

But what are these procedural rights, and how are they to be ascertained? In § 389 the question of standards was examined, and the Supreme Court's dichotomous approach was seen; here, in procedure, it is likewise so found.⁴ The consequences of a poor exercise of procedure, under the due process limitations, have been discussed in § 347 and need not here be re-examined.

§ 411. — The Procedural Content of Due Process

How the concept of procedural due process should be approached, and how its content should be formulated, was very soon put to the Supreme Court. In one of these early cases the unanimous bench felt that "in the statute, now under consideration, ample provision is made for an inquiry as to damages before a competent court and for a review of the proceedings of the court of original jurisdiction, upon appeal to the highest court of the

1. *Malinski v. New York* (1945) 324 U.S. 401, 414, 65 S.Ct. 781, 89 L.Ed. 1029, per Frankfurter, and *Burdau v. McDowell* (1921) 256 U.S. 465, 477, 41 S.Ct. 574, 65 L.Ed. 1048, per Brandeis, dissenting.

2. *Twining v. New Jersey* (1908) 211 U.S. 78, 101, 29 S.Ct. 14, 53 L.Ed. 97. By "citizen" is meant "person."

3. *People v. Steinhardt* (1961) 9 N. Y.2d 267, 269, 17 N.E.2d 871.

4. See, e. g., Frankfurter's concurring views in *Joint Anti-Fascist*

Refugee Committee v. McGrath (1951) 341 U.S. 123, 162f., 71 S.Ct. 624, 95 L.Ed. 417, and Black's views in *Adamson v. California* (1947) 332 U.S. 46, 91, 67 S.Ct. 1672, 91 L.Ed. 1903, and *Federal Power Commission v. Natural Gas Pipeline Co.* (1942) 315 U.S. 575, 601, fn. 4, 62 S.Ct. 736, 86 L.Ed. 1037.

While the quotations and citations may stress criminal procedure, we discuss civil as well as criminal procedure.

State. This is due process of law. . . .”⁵ In 1884 Justice Field wrote for an unanimous bench, including Harlan, upholding a state law which permitted the creation of a reclamation district upon petition, and in effect granted this district the power to levy taxes without notice or hearing, saying:

“It is sufficient to observe here, that by ‘due process’ is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights.”⁶

There is another view which, although set forth in a contempt of court case, is *apropos*:

“Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed.”⁷

We can, in effect, say that when a breach of a procedural “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental” occurs, so that one is “subjected [to] a hardship so acute and shocking that our polity will not endure it,” then due process is violated.⁸ Objection may be made that the sky therefore becomes the limit insofar as the Justices are given freedom to pick and choose anything, and that no sufficient standards are imposed upon them in the determination of what is “fundamental” or when it is “so rooted.” This position is taken by Justice Black, and § 389 goes into this at

5. *Pearson v. Yewdall* (1877) 95 U.S. 294, 296, 24 L.Ed. 436.

6. *Hagar v. Reclamation District No. 108* (1884) 111 U.S. 701, 707-708, 4 S.Ct. 663, 28 L.Ed. 569. On the “incorporation” meaning of this quotation, see § 396.

7. *Cooke v. United States* (1925) 267 U.S. 517, 537, 45 S.Ct. 390, 69 L.Ed. 767. For a like rule on the

preparation of a defense, see *Franklin v. South Carolina* (1910) 218 U.S. 161, 168-169, 30 S.Ct. 640, 54 L.Ed. 980 (rejecting the claim).

8. *Snyder v. Massachusetts* (1934) 291 U.S. 97, 105, 54 S.Ct. 330, 78 L.Ed. 674, *Palko v. Connecticut* (1937) 302 U.S. 319, 328, 58 S.Ct. 149, 82 L.Ed. 288. See also *Brown v. Mississippi* (1936) 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682.

length, the arguments there on the substantive content being applicable here on the procedural level.⁹

§ 412. Civil Matters—Adequate Notice

The adequacy of the notice which is required in civil cases (on administrative proceedings see Chap. IX) is of an overall two-fold nature; that in matters where property or a *res* itself is being proceeded against, in an *in rem* or a *quasi in rem* proceeding, even publication of a minimum type and nature is generally permitted,¹⁰ but where *in personam* jurisdiction is sought or required, then the notice must be of such a type or nature as to indicate there is a reasonable probability that the defendant will receive actual notice and thereby be apprised of the proceedings. Put differently, due process requires some umbilical cord between the defendant and the forum seeking to affect him or his property, say, physical presence there, or domicile, citizenship, or a minimum of contacts. Where there is no such a connection then a judgment in the forum state is not, even under the Full Faith and Credit Clause, enforceable in another state (§ 76), but under the Due Process Clause the judgment so obtained or being obtained may be attacked in its home state.

"The process of a court of one state cannot run into another and summon a party there domiciled to respond to proceedings against him. Notice sent outside the state to a nonresident is unavailing to give jurisdiction in an action against him personally for money recovery. There must be actual service within the state of notice upon him or upon some one authorized to accept service for him. A personal judgment rendered against a nonresident, who has neither

9. See, e. g., the Justice's concurrence in the International Shoe Case, *infra* note 13, where he feels a state's power over foreign corporations doing business in it should not be limited by any notions concerning fair play which may be derived from the due process concept.

10. See, e. g., the absconding husband statute, *Corn Exchange Bank v. Coler* (1930) 280 U.S. 218, 50 S. Ct. 94, 74 L.Ed. 378. In general, see also § 344, notes 121, 123.

But if there are known locations or addresses, publication alone is insufficient, e. g., *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 318-320, 70 S.Ct. 652, 94 L.Ed. 865 (distinguishing between known and unknown beneficiaries in a common trust fund,

and holding publication as to the latter sufficient, but as to the former not, because "it is not reasonably calculated to reach those who could easily be informed by other means at hand," i. e., the mails); *Walker v. City of Hutchinson* (1956) 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178 (eminent domain proceedings, with only publication, but where owner was a resident of state, his name was known to the city and on official records, held insufficient notice so given).

And where a known incompetent, without any guardian, is involved, even notice by mail plus posting and publication, is insufficient in a tax lien foreclosure proceeding. *Covey v. Somers* (1956) 351 U.S. 141, 76 S.Ct. 724, 100 L.Ed. 1021.

been served with process nor appeared in the suit, is without validity. The mere transaction of business in a state by non-resident natural persons does not imply consent to be bound by the process of its courts. The power of a state to exclude foreign corporations, although not absolute, but qualified, is the ground on which such an implication is supported as to them. But a state may not withhold from nonresident individuals the right of doing business therein."¹¹

A state may, without any due process violation, permit certified mail service upon a nonresident motorist who uses the state's highways and is there involved in an automobile accident, the theory being such highway use is acquiescence in the statutory appointment of the Secretary of State as his agent, and the non-resident's last known address is used; so too is a statute good which requires a foreign corporation doing business within a state to appoint a resident agent to accept service and, if the corporation withdraws, to continue such agent until the statute of limitations has run, otherwise the secretary of state is deemed its agent for such service; a domiciliary of a state retains such a relation to it that personal service outside the state, pursuant to statutory permission and in accordance with its requirements, is sufficient; a nonresident is also held subject to service on the sale of securities by him in the state.¹² The concept of "doing business," that is, when may a state serve a foreign corporation, not registered or licensed in the state, through some person there (e. g., a managing agent) or some method (e. g., registered mail), is of importance. The general answer is to say that when the foreign corporation "is so far 'present' there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it," then this is sufficient to permit the type of service mentioned which is reasonably calculated to apprise the foreign corporation of what is being done.¹³

In other words, two items are involved: (1) when is the foreign corporation so present, and this may be termed a question

11. *Hess v. Pawloski* (1927) 274 U. S. 352, 355, 47 S.Ct. 632, 71 L.Ed. 1091, citations omitted. See also reasoning in *Olberding v. Illinois Central R. R. Co.* (1953) 346 U.S. 338, 341-342, 74 S.Ct. 83, 98 L.Ed. 39, although holding federal venue requirements are not so waived. The Hess quotation's fifth sentence is not strictly accurate.

12. The Hess case, *supra* note 11, and *Wuchter v. Pizzutti* (1928) 276 U.S. 13, 24, 48 S.Ct. 259, 72 L.Ed. 446 (mere appointment of Secretary of State, and service upon him alone, is insufficient); *Washington ex rel. Bond & Goodwin, etc.*

v. Superior Court (1933) 289 U.S. 361, 53 S.Ct. 624, 77 L.Ed. 1256; *Milliken v. Meyer* (1940) 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278 (and see § 344, note 120); *Henry L. Doherty & Co. v. Goodman* (1935) 294 U.S. 623, 55 S.Ct. 553, 79 L.Ed. 1097. See also *Watson v. Employers Liability Assurance Corp.* (1954) 348 U.S. 66, 75 S.Ct. 166, 99 L.Ed. 74, upholding a state law permitting a direct suit against a tort-feasor's insurance company.

13. *International Shoe Co. v. Washington* (1945) 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95.

of fact or of substance; and (2) assuming such presence, then how is this foreign corporation to be served, and this may be termed a question of method or of procedure. As to the first, Chief Justice Stone felt that merely to use the terms present or presence, in saying that the foreign corporation is so far present as to satisfy the due process requirements,

“is to beg the question to be decided. For the terms ‘present’ or ‘presence’ are used merely to symbolize those activities of the corporation’s agent within the state which courts will deem to be sufficient to satisfy the demands of due process. Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An ‘estimate of the inconveniences’ which would result to the corporation from a trial away from its ‘home’ or principal place of business is relevant in this connection.

“‘Presence’ in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service or process has been given. . . . Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation’s behalf are not enough to subject it to suit on causes of action unconnected with the activities there. . . . To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process.

“While it has been held, in cases on which appellant relies, that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity . . . there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities. . .

“Finally, although the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it, other such acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit. . . .

"It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations.

"But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." ¹⁴

The second question is the method of service, and the International Shoe opinion has this to say concerning the service:

"We are likewise unable to conclude that the service of the process within the state upon an agent whose activities establish appellant's 'presence' there was not sufficient notice of the suit, or that the suit was so unrelated to those activities as to make the agent an inappropriate vehicle for communicating the notice. It is enough that appellant has established such contacts with the state that the particular form of substituted service adopted there gives reasonable assurance that the notice will be actual. . . . Nor can we say that the mailing of the notice of suit to appellant by registered mail at its home office was not reasonably calculated to apprise appellant of the suit." ¹⁵

14. *Ibid.*, at pp. 316-317, citations omitted. The corporation's activities were there held to be "neither irregular nor casual," and since the "obligation which is here sued upon arose out of those very activities," it was amenable to process. See also *Perkins v. Benguet Consolidated Mining Co.* (1952) 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 445.

15. *Ibid.*, at p. 320. The Supreme Court has gone so far in upholding

the "contact" and the "service" requirements just discussed, that in 1957, on the following fact situation, it said due process was satisfied: a foreign insurance corporation had no offices or agents in California; it had never solicited or done any business there; it issued one policy to a California resident, who paid his premiums from California; a state law permitted suit on insurance contracts even though the foreign corpora-

§ 413. — A Fair Hearing

A hearing in civil matters (administrative, Chap. IX, and criminal, §§ 419, 429) is generally provided by states through their judiciaries. The federal constitution does not necessarily mandate the formal paraphernalia of a judicial trial; thus in workmen's compensation matters, or in disability and health proceedings, where injuries and claims are involved, a state may substitute an administrative hearing, although judicial review is a requirement for the correction of at least procedural errors. Hearings are not required where, for example, investigative proceedings,¹⁶ or grants or other nonconstitutional fields (§§ 170, 191–193) are involved. But "Whether acting through its judiciary, or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."¹⁷ The right to a hearing is not all that is constitutionally required; it must also be "fair." This, of course, is a term which is susceptible of many meanings. In general, the trials held by the judicial courts are fair, with aberrations the exception. Some of these are seen in the sections which follow, although it must be noted that a distinction should be made between criminal and civil proceedings.¹⁸ Before, during, and after these trials or hearings, numerous requirements of procedural due process attach, as the sections which follow indicate.¹⁹

§ 414. — — Administrative Agencies

In Chapter IX we examined the due process requirements in administrative proceedings, and there saw that notice and an opportunity for a hearing were required in agency quasi-judicial

tion could not be served within the state; registered notice of the suit in California was sent to the corporation at its regular place of business in Texas; the court said there was a sufficiency of contact and a proper method of service. *McGee v. International Life Ins. Co.* (1957) 355 U.S. 220, 222–223, 78 S.Ct. 199, 2 L.Ed.2d 1957. See also *Travelers Health Ass'n v. Virginia* (1950) 339 U.S. 643, 70 S.Ct. 927, 94 L.Ed. 1154. *Quaere*: is the McGee holding to be limited to insurance policy cases?

16. *Hannah v. Larche* (1960) 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307, *United States v. Thomas* (1960) 362 U.S. 58, 80 S.Ct. 612,

4 L.Ed.2d 535, cited by *Alabama v. U. S.* (1962) — U.S. —, — S.Ct. —, — L.Ed.2d — (Civil Right Act of 1957 gives federal judges power to order specific negroes onto voting rolls).

17. Brandeis, in *Brinkerhoff-Faris Trust & Savings Co. v. Hill* (1930) 281 U.S. 673, 682, 50 S.Ct. 451, 74 L.Ed. 1107.

18. As to civil, see, e. g., *Fisher v. Pace* (1949) 336 U.S. 155, 156, 69 S.Ct. 425, 93 L.Ed. 569.

19. E. g., § 422 discusses evidence and presumptions in criminal cases; for civil matters, see *Western & Atl. R. R. v. Henderson* (1929) 279 U.S. 639, 49 S.Ct. 445, 73 L.Ed. 884.

matters.²⁰ If a person desires or asserts a privilege, then due process does not attach,²¹ or if summary seizure of illegal property is involved. The notice requirements are analogous to those in civil proceedings (§ 412) but are more loosely applied, while the hearing requirements are analogous to those in judicial proceedings but with variations permitted and even required and mandated because of certain differences in these procedures. There is no right to a jury trial.

§ 415. Criminal Proceedings—Ascertainable Standards

In § 389 various general standards were discussed, and the procedural one then quoted was that which is “of the very essence of a scheme of ordered liberty.”²² In other words, whatever is directed, enacted or done must be cast, in its procedural aspects, against this standard to see if the law or the act is denounced or upheld; the standard here is “ordered liberty,” and that which interferes with the “very essence” of this constitutional scheme is to be rejected. The ordered liberty is somewhat of a contradiction, it may be urged, but then superficially is “deliberate speed,” or other analogous phrases. If we conceive of nature as itself following or incorporating certain patterns of conduct, then for man these become standards or guides; and when there is a breach of such a standard then nature rejects the interloper or aberration. But within these patterns of nature’s requirements, man is free to explore, act, and seek for still more; so, too, with the ordered liberty in this constitutional sphere.

Thus, for example, a law which permits a person to know in advance what he can and cannot do, or places limits upon his conduct, sets up an ordered conduct within which limitations, however, he is at liberty to act, that is, ordered liberty. To illustrate, a law punishing “gangsters” should thus inform one that if he is such a person he will be punished; the particular law involved defined the term as “any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime;” this was held invalid as being too indefinite to apprise one of what he may not do.²³ Similarly a statute making it unlawful to print,

20. See, e. g., the Hagar case, *supra* note 6; Joint Anti-Fascist case, *supra* note 4.

summary seizure see *Lawton v. Steele* (1894) 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385.

21. E. g., *Oceanic Steam Navigation Co. v. Stranahan* (1909) 214 U.S. 320, 29 S.Ct. 671, 53 L.Ed. 1013; or if he seeks discretionary relief, *United States ex rel. Knauff v. Shaughnessy* (1950) 338 U.S. 537, 70 S.Ct. 309, 94 L.Ed. 317; on the

22. The *Palko* case, *supra* note 8, at p. 325.

23. *Lanzetta v. New Jersey* (1939) 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888. See also *Musser v. Utah* (1948) 333 U.S. 95, 68 S.Ct. 397, 92

publish, sell, or distribute any book, magazine, etc. "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime" was so denounced.²⁴ So, too, a registration statute was held insufficient to give "actual knowledge of the duty to register or . . . the probability of such knowledge" being obtained.²⁵

§ 416. — Ex Post Facto Laws

The principle, "Nullem crimen sine lege, nulla poena sine lege" (there is no crime without law, there is no punishment without law), was considered so fundamental that it was incorporated as a specific prohibition upon both the state and federal governments. Thus Art. I, § 10 limits the states insofar as such laws are legislated, and § 9 does the same for the federal government (§ 309). There is a distinction between such a law and a retrospective one; every former one is necessarily retrospective, but every latter one is not an *ex post facto* one; only the former are prohibited.

"I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law; and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive. In my opinion, the true distinction is between *ex post facto* laws, and retrospective laws. . . . Every law that takes away, or impairs, rights vested, agreeably to existing laws, is retrospective, and is generally unjust, and may be oppressive; and it is a good general rule, that a law should have no retrospect; but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a

L.Ed. 562, and *Herndon v. Lowry* (1937) 301 U.S. 242, 259, 57 S.Ct. 732, 81 L.Ed. 1066: "And where a statute is so vague and uncertain as to make criminal an utterance or an act which may be innocently said or done with no intent to undue resort to violence or on the other hand may be said or done with a purpose violently to subvert government, a conviction un-

der such a law cannot be sustained." And see also court's conclusion at pp. 263-264.

24. *Winters v. New York* (1948) 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840.

25. *Lambert v. California* (1957) 355 U.S. 225, 229, 78 S.Ct. 240, 2 L.Ed. 2d 225.

time antecedent to their commencement; as statutes of oblivion [limitation], or of pardon. They are certainly retrospective”²⁶

An habitual offender statute, imposing harsher punishment for those so violating the law, is not *ex post facto* legislation,²⁷ nor is a law so condemned which requires the denial of a medical license for those convicted of abortion, and is now applied to one so convicted before enactment of the law.²⁸ New punitive measures cannot be placed upon crimes already committed, although changing the method of execution from hanging to electrocution is no violation of the clause.²⁹

§ 417. — Bills of Attainder

We have already examined this like prohibition upon the federal government (§ 308), for Art. I, §§ 9–10 thus limit both sovereignties. The Lovett case there mentioned is an illustration of legislation which specifically mentions and punishes an individual. Like arguments have been unsuccessfully urged against state enactments which required each employee, as a condition of continued employment, to take a loyalty oath, for “We are unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment.”³⁰

§ 418. — Notice and Assistance of Counsel

There are many reasons for the requirement of notice, and one of them is to apprise the accused of what he is charged with so that he may prepare his defense. But it also serves to limit the state, e. g., a conviction for an offense not charged is a violation of due process.³¹ An indictment should contain a clear, accurate and unambiguous definition of, for example, a subcommittee’s authority in a contempt-of-congress proceeding, but instead, in one case, it “contained a wholly misleading and incorrect statement of the basis of that authority.” The court dismissed,

26. *Calder v. Bull* (1798) 3 Dall. 386, 390–391, 1 L.Ed. 648; see, however, *Beazell v. Ohio* (1925) 269 U.S. 167, 170–171, 46 S.Ct. 68, 70 L.Ed. 216.

27. *Gryger v. Burke* (1948) 344 U.S. 728, 68 S.Ct. 1256, 92 L.Ed. 1683.

28. *Hawker v. New York* (1898) 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002. On the loyalty oath aspects, see §§ 340, 400, and 425, and also see denunciations in 1867, and compare them with 1951 ruling. *Cummings v. Missouri* (1867) 4 Wall. 277, 18 L.Ed. 356, *Ex parte*

Garland (1867) 4 Wall. 333, 18 L. Ed. 366; *Garner v. Board of Public Works* (1951) 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317.

29. *Lindsey v. Washington* (1937) 301 U.S. 397, 401, 57 S.Ct. 797, 81 L.Ed. 1182, *Malloy v. South Carolina* (1915) 237 U.S. 180, 35 S.Ct. 507, 59 L.Ed. 905.

30. The *Garner* case, *supra* note 28, at p. 722.

31. *Cole v. Arkansas* (1948) 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644.

saying that "This not only runs afoul of accepted notions of fair notice but goes 'to the very substance of whether or not any crime has been shown.'"³²

The assistance of competent³³ counsel may be considered in the pre-trial stage, the trial and its proceedings (§ 430) and the post-conviction stage (§ 435). A refusal to grant a person under arrest an opportunity to consult with counsel before arraignment, or before or while being questioned, may result in holding the conviction or confession bad, as the accused be so prejudiced by such refusal as to affect the later trial with its fundamental unfairness.³⁴ In an investigative proceeding, a witness has no right to a lawyer.³⁵

§ 419. — Hearing—In General

The right to a fair trial is protected by the Due Process Clause,³⁶ and where there is domination by a mob, with a consequent actual interference with justice, a due process violation occurs.³⁷ The preparation for a trial is of like great importance, and a defendant is entitled to an adjournment or continuance for this purpose. For example, the right of an indigent defendant to have counsel appointed by the court on his behalf (§ 430) carries with it a corresponding right to an adequate preparation, for otherwise "the denial of opportunity for appointed counsel to confer,

32. *Seeger v. United States* (2d Cir. (1962) 303 F.2d 478, 484. See also the concurring words of Douglas in the Joint Anti-Fascist case, *supra* note 4, at p. 174.

33. On the competence or incompetence of counsel, see, e. g., *Wilson v. State* (1943) 222 Ind. 63, 51 N.E. 2d 848 (reversing for incompetence of defendant's own counsel); *Hawk v. Hahn* (D.C.Neb.1952) 103 F.Supp. 138 (involving ultimate victory for prisoner who claimed representation by a public defender was inadequate). See also note 83, *infra*.

34. *Crooker v. California* (1958) 357 U.S. 433, 78 S.Ct. 1287, 2 L.Ed.2d 1448, *Cicenia v. La Gay* (1958) 357 U.S. 504, 78 S.Ct. 1297, 2 L.Ed.2d 1523, although the court held the refusal per se did not render the confession bad. On arraignment, see *Hamilton v. Alabama* (1961) 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (unanimously holding conviction bad), cited in *Walton v. Arkansas* (1962) — U.S. —, — S.Ct. —, — L.Ed.2d —.

35. *In re Groban* (1957) 352 U.S. 330, 77 S.Ct. 510, 1 L.Ed.2d 376; *Anonymous v. Baker* (1959) 360 U.S. 287, 79 S.Ct. 1157, 3 L.Ed.2d 1234 (judge appointed to investigate allegedly improper practices of lawyers).

36. *Moore v. Dempsey* (1923) 261 U.S. 86, 91, 43 S.Ct. 265, 67 L.Ed. 543, *Buchalter v. New York* (1943) 319 U.S. 427, 63 S.Ct. 1129, 87 L. Ed. 1492; and see also § 429.

37. *Frank v. Mangum* (1915) 237 U.S. 309, 335, 35 S.Ct. 582, 59 L.Ed. 961. On another aspect of this case, see § 436, in which *United States ex rel. Noia v. Fay* (2d Cir. 1962) 300 F.2d 345, 360, cert. granted (1962) 369 U.S. 869, 82 S.Ct. 1140, 8 L.Ed.2d 274, says the Frank case "in certain respects announced a very limited, now obsolete, scope for federal habeas corpus" However, insofar as mob domination is concerned, Holmes, in the *Moore* case, *supra* note 36, at pp. 90-91, cited and quoted the Frank case with approval.

to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham . . .”³⁸

§ 420. — — The Judge and the Prosecutor

“[I]t certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.”³⁹ However, the following year the court upheld a liquor law prosecution, conducted by the mayor of a city which had a commission form of government, where the mayor performed only judicial duties and received a regular salary, paid from a fund maintained by the fines he imposed.⁴⁰ Misrepresentations to an accused, who is without counsel, and who pleads guilty, results in a violation;⁴¹ so where a prosecutor knowingly uses perjured testimony or deliberately suppresses evidence to impeach it.⁴²

§ 421. — — The Jury

There is no constitutional right to a jury in a state criminal trial,⁴³ and the mere assertion that injustice has occurred in the selection of jurors and the court’s rulings on challenges raise no due process challenge;⁴⁴ but the exclusion of, say, Negroes from grand and petit juries, solely because of their race, denies a Negro defendant his constitutional rights.⁴⁵ “A long and unbroken line of our decisions since then [1880] has reiterated that principle, regardless of whether the discrimination was embodied in statute or was apparent from the administrative practices of state jury

38. *Avery v. Alabama* (1940) 308 U.S. 444, 446, 60 S.Ct. 321, 84 L.Ed. 377; see also *Hawk v. Olson* (1945) 326 U.S. 271, 66 S.Ct. 116, 90 L.Ed. 61.

39. *Tumey v. Ohio* (1927) 273 U.S. 510, 523, 47 S.Ct. 437, 71 L.Ed. 749.

40. *Dugan v. Ohio* (1928) 277 U.S. 61, 48 S.Ct. 439, 72 L.Ed. 784.

41. *Smith v. O’Grady* (1941) 312 U.S. 329, 61 S.Ct. 572, 85 L.Ed. 859.

42. *Mooney v. Holohan* (1935) 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (remanding for application to state courts for a writ of habeas corpus before proceeding in the federal courts; see also *Alcorta v. Texas* (1957) 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9. See, also, for an excellent summary of cases in this area, *United States v. Soblen* (S.D.N.Y. 1961) 203 F.Supp. 542, 562-567. In

Brody v. Maryland (1962) — U.S. —, — S.Ct. —, — L.Ed.2d —, review was granted where the prosecutor suppressed evidence that while defendant had planned, another had actually killed, and the state court had granted a new jury trial on punishment only, not guilt.

43. *Walker v. Sauvinet* (1875) 92 U.S. 90, 23 L.Ed. 678, *Maxwell v. Dow* (1900) 176 U.S. 581, 20 S.Ct. 448, 44 L.Ed. 597, *Dohany v. Rogers* (1930) 281 U.S. 362, 369, 50 S.Ct. 299, 74 L.Ed. 904.

44. *Buchalter v. New York* (1943) 319 U.S. 427, 430, 63 S.Ct. 1129, 87 L.Ed. 1492.

45. *Strauder v. West Virginia* (1880) 100 U.S. 303, 25 L.Ed. 664. A statute offering a general exemption from jury duty to women is good. *Hoyt v. Florida* (1961) 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.2d 118.

selection officials, and regardless of whether the system for depriving defendants of their rights was 'ingenious or ingenuous.'"⁴⁶ Thus, where the facts show that for thirty years no Negro has served upon a jury, grand or petit, in a county where over 35% of the adults are Negroes, an inference of systematic exclusion is not repelled by a showing that only a very small number (about 25, as estimated by the trial court) of Negroes could be considered for jurors.⁴⁷ A "blue ribbon" or special jury is not *per se* a due process or equal protection violation.⁴⁸

§ 422. — — Evidence and Presumptions

When a defendant alleges "that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him," then "These allegations sufficiently charged a deprivation of rights . . . and, if proven, would" be a constitutional violation.⁴⁹ A state may, however, place the burden of proof upon a defendant pleading insanity, and require him to prove this defense beyond a reasonable doubt.⁵⁰ Due process does not require a defendant's right to be present when a jury views the scene of the crime,⁵¹ and "The hearsay-evidence rule, with all its subtleties, anomalies and ramifications, will not be read into the Fourteenth Amendment."⁵²

Presumptions may be termed the meat of a legal proceeding, and both the common law, statutes, and even the Constitution create and control them. For example, "numerous statutes have been enacted providing that proof of one fact shall be *prima facie* evidence of the main fact in issue; and where the inference is not purely arbitrary, and there is a rational relation between the two facts, and the accused is not deprived of a proper opportunity to submit all the facts bearing upon the issue, it has been held that such statutes do not violate the requirements of due process of law."⁵³ However, Congress (and the states) cannot create a pre-

46. *Patton v. Mississippi* (1947) 332 U.S. 463, 465-466, 68 S.Ct. 184, 92 L.Ed. 76; *Shepherd v. Florida* (1951) 341 U.S. 50, 71 S.Ct. 549, 95 L.Ed. 740.

47. The *Patton* case, *supra* note 46, an equal protection holding.

48. *Moore v. New York* (1948) 333 U.S. 565, 68 S.Ct. 705, 92 L.Ed. 881, *Fay v. New York* (1947) 332 U.S. 261, 67 S.Ct. 1613, 91 L.Ed. 2043.

49. *Pyle v. Kansas* (1942) 317 U.S. 213, 216, 63 S.Ct. 177, 87 L.Ed. 214.

50. *Leland v. Oregon* (1952) 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302.

51. *Snyder v. Massachusetts*, *supra* note 8.

52. *Stein v. New York* (1953) 346 U.S. 156, 196, 73 S.Ct. 1077, 97 L.Ed. 1522.

53. *Bailey v. Alabama* (1911) 219 U.S. 219, 238, 31 S.Ct. 145, 55 L.Ed. 191. See also *Manley v. Georgia* (1929) 279 U.S. 1, 6, 49 S.Ct. 215, 73 L.Ed. 575. Regardless of presumptions, where a conviction rests

sumption "that, from the prisoner's prior conviction of a crime of violence and his present possession of a firearm or ammunition, it shall be presumed (1) that the article was received by him in interstate or foreign commerce, and (2) that such receipt occurred subsequent to July 30, 1938, the effective date of the statute."⁵⁴

§ 423. — The Bill of Rights—In General

In our discussion of the Constitution and the Amendments, especially in § 327, we saw that the application of the Bill of Rights, as a group, was limited to the federal, and not state, government; in analyzing the P & I Clause we cited and quoted, in § 378, numerous decisions to the effect that the Bill of Rights, *per se*, was not brought within that Clause, but we also saw that Justices Field and Harlan teamed up to go whole-hog to the contrary; and in §§ 394–397 we examined these overall views under Due Process Substantive, the conclusions being the same. Insofar as Due Process Procedural likewise may be so examined, the early Harlan approach of total procedural incorporation⁵⁵ was rejected and the current judicial method is that of the gradual inclusion and exclusion of concepts and limitations on a case-by-case approach. "The notion that the 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and therefore incorporates them has been rejected by this Court again and again, after impressive consideration."⁵⁶

§ 424. — — 4th Amendment—Unreasonable Searches and Seizures

In § 337 we examined the 4th Amendment's prohibitions upon unreasonable searches and seizures. We saw that under the 1961 Mapp case apparently all federal and state courts were unable to use such evidence; links and leads obtained therefrom are also so tainted, as are photographs or copies of such evidence. There is no unreasonable search where a statute fines a householder \$20 for a refusal or delay in opening his house to a city's health employee whenever there is cause to suspect the existence of a nuisance, nor is a jail room the equivalent of a home.⁵⁷

upon grounds so totally devoid of evidentiary support that a finding of guilt cannot be supported, a due process violation occurs. *Garner v. Louisiana* (1961) 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207.

54. *Tot v. United States* (1943) 319 U.S. 463, 467–468, 63 S.Ct. 1241, 87 L.Ed. 1519.

55. See, e. g., *Hurtado v. California* (1884) 110 U.S. 516, 550, 4 S.Ct.

111, 28 L.Ed. 232, quotation in § 394.

56. *Wolf v. Colorado* (1949) 338 U.S. 25, 26, 69 S.Ct. 1359, 93 L.Ed. 1782, holding reversed in *Mapp v. Ohio* (1961) 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081.

57. *Frank v. Maryland* (1959) 359 U.S. 360, 79 S.Ct. 804, 3 L.Ed.2d 877; *Lanza v. N. Y.* (1962) 370 U.S. 139, 82 S.Ct. 1218, 8 L.Ed.2d 384.

§ 425. — — 5th Amendment—Self-Incrimination

A defendant in a state court is not protected against self-incrimination because of the particular clause in the Bill of Rights; rather, it is due process which “forbids compulsion to testify by fear of hurt, torture or exhaustion.”⁵⁸ In other words, coerced confessions will not be permitted in state criminal trials, and “the ruling of the trial court and the finding of the jury on the voluntary character of the confession do not foreclose the independent examination which it is our duty to make here.”⁵⁹ What Brandeis wrote of the federal courts is here *apropos*, that

“the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made. A confession may have been given voluntarily, although it was made to police officers, while in custody and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded, whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise.”⁶⁰

So where deputies “hanged him [the defendant] by a rope to a limb of a tree, and having let him down, they hung him again, and when he was let down a second time, he still protested his innocence, he was tied to a tree and whipped,” but then let go, and yet arrested again and thereafter was “severely whipped” and threatened with “whipping until he confessed,” such a confession

The Mapp case, *supra* note 56, and discussed in § 337, raises several problems. One such is whether the federal judiciary's interpretations of the 4th Amendment's prohibitions will be required to be enforced by the states in their own matters, or whether the states can determine for themselves what the prohibitions mean since it is their own jurisdictions which are involved. Phrased differently, will a single, uniform interpretation be a requirement under the Mapp doctrine, or will 50 separate interpretations, besides that of the federal judiciary, be permissible. Without too great an examination, it would appear that a federal constitutional clause, mandated upon the states, would likewise mandate state acceptance and enforcement of the federal interpretation. This has happened in many other instances, so that there is nothing startling in its adoption for this instance. See, for its use in labor-

management relations, *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.* (1955) 348 U.S. 437, 75 S.Ct. 488, 99 L.Ed. 510, where Taft-Hartley § 301(a) was held to apply to the enforcement of collective bargaining agreements, and a body of federal substantive law thereon had now to be created, which the states, in cases coming under the section, had to apply.

58. *Adamson v. California* (1947) 332 U.S. 46, 53, 54, 67 S.Ct. 1672, 91 L.Ed. 1903; *Rogers v. Richmond* (1961) 365 U.S. 534, 540, 81 S.Ct. 735, 5 L.Ed.2d 760. See also §§ 378, notes 35-36, and 389, note 25. On the right to counsel in the pre-trial proceedings, see § 418.

59. *Haley v. Ohio* (1948) 332 U.S. 596, 599, 68 S.Ct. 302, 92 L.Ed. 224 (15-year old Negro boy).

60. *Wan v. United States* (1924) 266 U.S. 1, 14-15, 45 S.Ct. 1, 69 L.Ed. 131.

is inadmissible; or where two defendants "were made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it," and they were threatened with continued beatings, their confessions, too, were inadmissible.⁶¹ The use of a stomach pump to obtain capsules, swallowed when police entered defendant's house without a warrant, is also inadmissible.⁶²

"There is torture of mind as well as body; the will is as much affected by fear as by force. And there comes a point where this Court should not be ignorant as judges of what we know as men." So, where a prisoner was kept for two days in solitary confinement in "the hole," driven three days around town hours at a time, questioned by six to eight officers in relays as well as by "an interrogator of twenty years' experience as lawyer, judge and prosecutor," with the questioning being for hours on end, not given the "prompt preliminary hearing before a magistrate" required by state law, and otherwise hounded, such a confession is bad even though not a hand is laid upon the prisoner.⁶³ And in 1957 the court went even farther in throwing out a confession of "an uneducated Negro, certainly of low mentality, if not mentally ill," who saw no friend or relative as these were barred from him.⁶⁴ In § 340 the McNabb rule was discussed, and we saw that in the federal jurisdiction a prompt arraignment was necessary, although now the federal rules, as interpreted in the Mallory case, apply. The court there said that "Nearly all the States have similar enactments," and denounced a situation where "Not until he had confessed, when any judicial caution had lost its purpose, did the police arraign him."⁶⁵

61. *Brown v. Mississippi* (1936) 297 U.S. 278, 281, 281-282, 282, 56 S.Ct. 461, 80 L.Ed. 682. See also *Chambers v. Florida* (1940) 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716.

62. *Rochin v. California* (1952) 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183, the concurring minority feeling the Fifth's prohibitions applied.

63. *Watts v. Indiana* (1949) 338 U.S. 49, 52, 53, 69 S.Ct. 1347, 93 L.Ed. 1801. Justice Jackson, at p. 60, wrote of a confession: "Nor is it questioned that the same result can sometimes be achieved by threats, promises, or inducements, which torture the mind but put no scar on the body." See also *Turner v. Pennsylvania* (1949) 338 U.S. 62, 69 S.Ct. 1352, 93 L.Ed. 1810, *Harris v. South Carolina* (1949) 338 U.S. 68, 69 S.Ct. 1354, 93 L.Ed. 1815, *Blackburn v. Alabama* (1960) 361 U.S. 199, 206, 80 S.Ct. 274, 4

L.Ed.2d 242. In *Gallegos v. Colorado* (1962) 370 U.S. 49, 82 S.Ct. 1209, 8 L.Ed.2d 325 (a 4-3 case), a 14 year old boy's conviction was reversed where he had had no lawyer, friend, or other aid prior to confessing, and the majority felt it was a "secret inquisitorial" procedure (see also *Fikes v. Ala.*, *infra* note 64).

64. *Fikes v. Alabama* (1957) 352 U.S. 191, 196, 197, 77 S.Ct. 281, 1 L.Ed.2d 246. For a listing of coerced confession cases, see *Spano v. New York* (1959) 360 U.S. 315, 321, fn. 2, 79 S.Ct. 1202, 3 L.Ed.2d 1265. For post-conviction remedies, see § 435, and for federal review of state convictions involving coerced confessions see § 436, especially the *Noia* case, at note 120.

65. *Mallory v. United States* (1957) 354 U.S. 449, 452, 455, 77 S.Ct. 1356, 1 L.Ed.2d 1479.

The cases discussing the loyalty and security oaths and investigations, previously examined in § 340, are applicable here, on the state level. For example, a city statute provided that an employee invoking the privilege against self-incrimination to avoid answering a question relating to his official conduct thereby forfeited his job. A Senate committee investigating matters affecting national security subpoenaed a college professor who refused to answer questions concerning past membership in the Communist Party; the witness was later notified by the city that he was dismissed. The Supreme Court reversed state court decisions upholding the application of the statute here. "The problem of balancing the State's interest in the loyalty of those in its service with the traditional safeguards of individual rights is a continuing one. To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities. . . . But in each of these cases it was emphasized that the State must conform to the requirements of due process."⁶⁶

Immunity destroys the self-incrimination privilege, but does federal immunity also prevent state prosecution, and does state immunity prevent federal prosecution? Immunity here is a one-way street. Assuming a valid federal immunity which grants it from state prosecution also, the witness' federal testimony cannot be used in either jurisdiction; but assuming a valid state immunity which seeks to prevent a federal prosecution, the witness' state testimony may nevertheless be used in the federal jurisdiction.⁶⁷

§ 426. — — — Unreasonable Seizure and Self-Incrimination

As we saw in §§ 337 and 424-425, the concept involved in combining the 4th and 5th prohibitions stems from a view that one's property is a part of one's "self," that is, that it is in effect an extension of one's personality. This Hegelian concept permits the next step to be taken, that when one's personality as expressed in books, records, property, etc. is now sought to be used against him in a proceeding, it is similar, if not identical, to compelling one to testify against himself. In this combined sense the 4th and 5th Amendments coalesce into a constitutional prohibition

66. *Slochower v. Board of Higher Education* (1956) 350 U.S. 551, 555, 76 S.Ct. 637, 100 L.Ed. 692, citations omitted. There were four dissenters and Black and Douglas joined the majority's "judgment and opinion" but separately noted adherence to their dissents in previous cases. See also *Regan v. New York* (1955) 349 U.S. 58, 75 S.Ct. 585, 99 L.Ed. 883.

67. See *United States v. Murdock* (1931) 284 U.S. 141, 52 S.Ct. 63, 76 L.Ed. 210; *Adams v. Maryland* (1954) 347 U.S. 179, 74 S.Ct. 442, 98 L.Ed. 608; *Knapp v. Schweitzer* (1958) 357 U.S. 371, 78 S.Ct. 1302, 2 L.Ed.2d 1393; *Mills v. Louisiana* (1959) 360 U.S. 230, 79 S.Ct. 980, 3 L.Ed.2d 1193.

against the use in evidence of illegally seized property. Wiretapping, however, is not within these 4th Amendment concepts,⁶⁸ but is prohibited by § 605 of the Federal Communications Act;⁶⁹ such evidence is inadmissible in a federal criminal prosecution, however obtained, even if by state officers acting under state laws and court orders, but states may continue to admit it in their own courts.⁷⁰ The Mapp rule does not, apparently, follow through in the area of wiretapping, but it is suggested that when Justices Black, Douglas, and Frankfurter agree upon a matter as important as this, then perhaps there will not be disagreement in a case in the near future which will overturn the Olmstead rule. Considerations of policy in the enforcement of criminal proceedings indicate that there should not be different rules and applications in such a national area, increasingly subject to national control. There should either be no wiretapping locally, to conform to the federal rule, or there should be a degree of limited wiretapping nationally and locally, with uniformity underscored by Congressional legislation. (We prefer and suggest the latter.)

§ 427. — — — Presentment or Indictment by Grand Jury

The first case in which this question arose, whether the above 5th Amendment's requirements were limitations upon the states through the 14th, was in *Hurtado v. California*, decided in 1884. Seven Justices said no, one dissented (Harlan) and one did not participate (Field). The majority entered upon an extended historical review of due process, felt that it "is equivalent to 'law of the land,' as found in the 29th chapter of Magna Charta," compared the 5th and 14th Amendments, and concluded to the contrary.⁷¹ A one-man "judge-grand jury" violates due process when

68. On *Lee v. United States* (1952) 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270 (see also note 70, *infra*). The case of *Olmstead v. United States* (1928) 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944, was discussed in the dissenting opinions; it held wiretapping not constitutionally banned.

69. 48 Stat. 1103 (1934), 47 U.S.C.A. § 605; see, e. g., *Rathbun v. United States* (1957) 355 U.S. 107, 78 S.Ct. 161, 2 L.Ed.2d 134.

70. *Benanti v. United States* (1957) 355 U.S. 96, 78 S.Ct. 155, 2 L.Ed.2d 126; *Silverman v. United States* (1961) 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734; *Schwartz v. Texas* (1952) 344 U.S. 199, 73 S.Ct. 232, 97 L.Ed. 231.

See also § 314, note 19, and § 337, note 80, and *Pugach v. Sullivan* (S.D.N.Y.1960) 180 F.Supp. 67, *affd.*

(2d Cir. 1960) 277 F.2d 739, *affd.* sub nom. *Pugach v. Dollinger* (1961) 365 U.S. 458, 81 S.Ct. 650, 5 L.Ed.2d 678.

See also § 337, note 85, discussing the views of the New York Court of Appeals, but it should be noted that this case follows a strict interpretation, seeks to uphold state efforts to combat crime, and in general adopts a state's rights position.

In the *On Lee* case, *supra* note 68, Justices Frankfurter, Douglas, and Burton wrote dissenting opinions, and Black felt that under the federal supervisory jurisdiction the evidence should not have been admitted by the trial court.

71. The *Hurtado* case, *supra* note 55, at pp. 534-538.

the judge seeks in open court to punish for contempt a refusal to answer his questions asked in the so-called grand jury room.⁷²

§ 428. — — — Double Jeopardy

A state is not limited by this 5th Amendment right, so that it may, for example, permit itself to take an appeal in a criminal case.⁷³ There is no double jeopardy when a single act violates both federal and state laws so that a person may be prosecuted successively in both jurisdictions; nor does a criminal prosecution in either or both jurisdictions exempt a defendant from a damage or other type of civil suit; additionally, where the conduct of a defendant results in the commission of more than one crime, separate prosecutions do not violate this clause; or, different parts of a single set of acts may violate several statutes, with resulting separate prosecutions. The imposition of a heavier penalty for a multiple violator is no denial of due process or double jeopardy. If a jury is discharged because of inability to reach a verdict, there is no double jeopardy.⁷⁴

§ 429. — — 6th Amendment—Criminal Trial, Confrontation, Subpenas

States are not required to grant jury trials in criminal proceedings, but since procedural due process requires adequate notice and a fair hearing, then the right of adequate preparation, of process to obtain witnesses, and of confrontation and cross-examination, all must be honored by the state.⁷⁵ Since a person is to "be informed of the nature and cause of the accusation" under the 6th Amendment, and since this is an ingredient of due process, this portion of the 6th also limits the states. The amendment's "right to a speedy and public trial"⁷⁶ does not mean arrest, in-

72. *In re Murchison* (1955) 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942. See also the *Oliver* case, *infra* note 76.

73. The *Palko* case, *supra* note 8.

74. *United States v. Perez* (1824) 9 Wheat. 579, 6 L.Ed. 165; *Albrecht v. United States* (1927) 273 U.S. 1, 47 S.Ct. 250, 71 L.Ed. 505; *Ciucci v. Illinois* (1958) 356 U.S. 571, 78 S.Ct. 839, 2 L.Ed.2d 983; *Hoag v. State* (1958) 356 U.S. 464, 78 S.Ct. 829, 2 L.Ed.2d 913; *Gryger v. Burke* (1948) 334 U.S. 728, 68 S.Ct. 1256, 92 L.Ed. 1683; *Bartkus v. Illinois* (1959) 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684, and *Abbate v. United States* (1959) 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729.

75. See language of Cardozo in the *Snyder* case, *supra* note 8, at pp. 105-106. Confessions by third persons, not able to be cross-examined by defendant, are admissible against him. The *Stein* case, *supra* note 52. On confrontation, see also § 341.

76. In a federal prosecution under the Mann Act the trial judge cleared the courtroom of all persons except jurors, lawyers, witnesses, and the press; the appellate court reversed. *United States v. Kobli* (3d Cir. 1949) 172 F.2d 919, although in a co-defendant's trial waiver was applied in *United States v. Sorrentino* (3d Cir. 1949) 175 F.2d 721, cert. den. (1949) 338

dictment, arraignment, plea, trial, and conviction and sentencing all in one day; this is a trifle too speedy. Nor can a state prevent an accused's family from being present at a trial, although exclusion of the public and newsmen in certain instances is upheld. A trial in fact dominated by a mob, resulting in an actual interference with justice, is violative of due process.⁷⁷

§ 430. — — — Assistance of Counsel

A defendant has an absolute and "unqualified" right to counsel of his own choosing and retaining,⁷⁸ and he may also refuse legal aid, but "Only when the accused refuses counsel with an understanding of his rights can the court dispense with counsel."⁷⁹ But even where an accused does not request counsel, still, "Where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair," due process requires the court to appoint counsel.⁸⁰ What about a situation where a defendant wants a lawyer but can't afford to pay one? In the federal courts, as we have seen, an indigent defendant is entitled to counsel obtained by the government in any criminal matter,⁸¹ but what about indigent defendants who desire a lawyer to represent them in a state criminal proceeding?

In 1931 Ozie Powell and three other Negroes, all at or below nineteen, ignorant and illiterate, nonresidents of Alabama, were indicted for rape, on the same day being arraigned and pleading not guilty. Thereafter, and during a colloquy immediately preceding the trial, the judge, in response to a question, "said that he had appointed all the members of the [local] bar for the purpose of" representing the defendants "if no counsel appeared."

U.S. 868, 70 S.Ct. 143, 94 L.Ed. 532.

See also *In re Oliver* (1948) 333 U.S. 257, 68 S.Ct. 699, 92 L.Ed. 682, overturning Michigan's one-man grand jury (see the *Murchison* case, note 72, *supra*).

77. The *Moore* case, *supra* note 36, and see also concurring opinion in *Shepherd v. Florida* (1951) 341 U.S. 50, 71 S.Ct. 549, 95 L.Ed. 740.

78. *Chandler v. Fretag* (1954) 348 U.S. 3, 9, 75 S.Ct. 1, 99 L.Ed. 4.

79. *Uveges v. Pennsylvania* (1948) 335 U.S. 437, 69 S.Ct. 184, 93 L.Ed. 127. Proceedings in the absence of retained counsel are void. *House*

v. Mayo (1945) 324 U.S. 42, 65 S.Ct. 517, 89 L.Ed. 739.

80. The *Uveges* case, *supra* note 79, at p. 441; quoted with approval in *Cash v. Culver* (1959) 358 U.S. 633, 637, 79 S.Ct. 432, 3 L.Ed.2d 557, remanding a writ of habeas corpus to determine the true facts. See also *De Meerleer v. Michigan* (1947) 329 U.S. 663, 67 S.Ct. 596, 91 L.Ed. 584, and *Palmer v. Ashe* (1951) 342 U.S. 134, 72 S.Ct. 191, 96 L.Ed. 154, and *Marino v. Ragen* (1947) 332 U.S. 561, 68 S.Ct. 240, 92 L.Ed. 170.

81. *Johnson v. Zerbst* (1938) 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461. See also § 341.

The trial proceeded, a verdict of guilty was rendered by the jury, and they also imposed the death penalty upon all defendants. With two dissents the Supreme Court reversed. "It is hardly necessary to say that . . . a defendant should be afforded a fair opportunity to secure counsel of his own choice. Not only was that not done here, but such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard." The appointment of counsel so made "was little more than an expansive gesture, imposing no substantial or definite obligation upon any" lawyer, so that "during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself." The majority concluded their reversal of the conviction with this paragraph:

"The United States by statute and every state in the Union by express provision of law, or by the determination of its courts, make it the duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him. In most states the rule applies broadly to all criminal prosecutions, in others it is limited to the more serious crimes, and in a very limited number, to capital cases. A rule adopted with such unanimous accord reflects, if it does not establish the inherent right to have counsel appointed at least in cases like the present, and lends convincing support to the conclusion we have reached as to the fundamental nature of that right."⁸²

This "Powell Rule" of effective counsel in a capital case thus became a due process requirement. However, what was meant by effective,⁸³ and was the type of case to be limited to a capital one? For example, in 1942 a robbery conviction was upheld, despite a state denial of an indigent defendant's request for a lawyer, because capital punishment was not involved, nor was the defendant ignorant, nor was any other special circumstance present;⁸⁴ and in 1947, upon a plea of guilty to burglary and larceny indictments, a contention of a due process violation was rejected where there was only "in effect the bald claim that . . . the record does

82. *Powell v. Alabama* (1932) 287 U.S. 45, 53, 56, 57, 73, 53 S.Ct. 55, 77 L.Ed. 158.

83. See, e. g., note 33, *supra*. There must be no conflicting interests which affect counsel's loyalty to his client. *Glasser v. United States* (1942) 315 U.S. 60, 62 S.Ct. 457, 86

L.Ed. 680. There must be a clear showing made to support an allegation of incompetence. *Diggs v. Welch* (1945) 80 U.S.App.D.C. 5, 148 F.2d 667, cert. den. (1945) 325 U.S. 889, 65 S.Ct. 1576, 89 L.Ed. 2002.

84. *Betts v. Brady* (1942) 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595.

not disclose an offer of counsel to a defendant upon a plea of guilty, although the court before accepting the plea duly advised him of his 'rights of Trial' and of the consequences of such a plea" ⁸⁵ In 1961 a unanimous court felt that a violation occurred in an assault (to murder) case where "an indigent, ignorant and mentally ill Negro then 29 years of age, advised the court that he was without, and unable to obtain, counsel to conduct his defense and asked that counsel be appointed to represent him. The judge declined to do so" because it was not a capital case, and defendant didn't need a lawyer. The reversal held that here the latter must be furnished by the state "whether or not the accused requested the appointment of counsel." ⁸⁶

Of greater importance is the fact that Justice Douglas, with Justice Brennan concurring, not only agreed with the majority but desired to reverse "*Betts v. Brady* which is so at war with our concept of equal justice under law," and now hold that a state had to appoint counsel for indigent defendants in every criminal case. ⁸⁷ Finally, in 1962, a unanimous court, but with only seven Justices participating, reversed a state non-capital (incest) conviction of an illiterate defendant, who "did not interpose a single objection during the trial," because counsel had not been appointed. Justice Brennan wrote for the majority, but did not cite *Betts v. Brady*, and Justices Black (Chief Justice Warren and Justice Douglas concurring) and Douglas wrote separately. These three desired to overrule the *Betts* case. Justice Brennan's hesitancy undoubtedly was due to the fact that Justice White had not yet ascended the bench, and Justice Frankfurter was ill, so that neither participated, and that a full bench may have been desired before such an important reversal occurred, with its attendant financial and legal consequences to the states. ⁸⁸

85. *Foster v. Illinois* (1947) 332 U.S. 134, 138, 67 S.Ct. 1716, 91 L.Ed. 1955, Justices Black, Douglas, Murphy, and Rutledge dissented.

86. *McNeal v. Culver* (1961) 365 U.S. 109, 110, 111, fn. 1, 81 S.Ct. 413, 5 L.Ed.2d 445; see also § 425, note 63.

87. *Ibid.* It is suggested that traffic offenses will not come within such a requirement (assuming it follows), and it would appear that some lower or minimum line would have to be drawn, for financial reasons at least.

88. *Carnley v. Cochran* (1962) 369 U.S. 506, 82 S.Ct. 884, 888, 8 L.Ed. 2d 70. The court also felt that

waiver of the right to counsel was a burden which the state had to bear, citing the *Johnson* case, *supra* note 81. On post-conviction aspects, see § 435. In *Gideon v. Cochran* (1962) 370 U.S. 908, 82 S.Ct. 1259, 8 L.Ed.2d 403, certiorari was granted with an additional question added: "Should this Court's holding in *Betts v. Brady* . . . be reconsidered?"

Since then Mr. Justice Frankfurter has resigned, and Mr. Justice Goldberg has replaced him. This permits the 3-Justice (with Brennan, a 4-Justice) minority to become a majority if one of the two new Justices votes with them.

§ 431. — — 7th Amendment—Common Law Jury Trials

Are the states compelled, because of the 14th Amendment, to provide jury trials in every common law suit over twenty dollars? In 1876 the Supreme Court said no,⁸⁹ and in 1877 it reiterated that "We have held, over and over again, that Art. VII, of the Amendments . . . applies only to the courts of the United States . . ." ⁹⁰ And even a cause of action under the Federal Employers' Liability Act, when sued upon in a state court, is subject to the state's rule permitting a verdict by a less than unanimous vote.⁹¹ However, the last clause of this 7th Amendment, "and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law," governs a federal court which may re-examine facts tried by a jury in a state court.⁹²

§ 432. — — 8th Amendment—Excessive Bail

The limitations in this Amendment do not apply to the states, but reference may be made to a 1952 case in which the Supreme Court felt that this requirement concerning bail did not "accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail." Justice Black's dissent felt that "Today the Court holds that law-abiding persons, neither charged with nor convicted of any crime, can be held in jail indefinitely, without bail . . ." ⁹³ In general, the states have likewise divided matters into bailable and non-bailable, and it is their own constitutions, laws, decisions, and public policy which discuss "excessive." ⁹⁴

89. The Walker case, note 43, *supra*.
See also Kennard v. Louisiana (1875) 92 U.S. 480, 23 L.Ed. 478.

90. Pearson v. Yewdall (1877) 95 U.S. 294, 296, 24 L.Ed. 436.

91. Minneapolis & St. Louis R. R. Co. v. Bombolis (1916) 241 U.S. 211, 36 S.Ct. 595, 60 L.Ed. 961. As to the sufficiency of the evidence to go to the jury, a federal right is here involved and the federal rules apply. Wilkerson v. McCarthy (1949) 336 U.S. 53, 69 S.Ct. 413, 93 L.Ed. 497.

92. The Justices v. United States ex rel. Murray (1870) 9 Wall. 274, 19 L.Ed. 658.

93. Carlson v. Landon (1952) 342 U.S. 524, 545-546, 72 S.Ct. 525, 96 L.Ed. 547. Justices Frankfurter, Douglas, and Burton also wrote dissenting opinions.

94. Of interest is a speech by Presiding Justice Bernard Botwin, of

the New York Appellate Division, 1st Department, to a lawyers' association, disclosing that many persons in the City of New York, awaiting trial, were in jail for inordinate periods because of an inability to raise bail, even of \$500 (28% of the defendants). He supported a release of defendants, in selected cases, without bail, saying a Vera Foundation study had disclosed less bail-jumping here than where bail was furnished. To what avail, asked the Justice, is a victory for the defendant "if after acquittal your client goes back into the world crushed and defeated—if in the interim between arrest and trial your client loses his job, his family goes on relief, and his neighbors, unable to distinguish between a man lodged in jail after a conviction or awaiting trial, shun him like a pariah?" In other words, this writer adds, the operation was a success although the

§ 433. — — — Cruel and Unusual Punishment

Although the 8th Amendment's requirements do not operate upon the states, due process prohibits the infliction of cruel and unusual punishment.⁹⁵ "Because a State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal," nor because an accused may constitutionally be compelled to take the stand, does this sanction a confession by torture.⁹⁶ Whatever state remedies may be available on account of cruel and unusual punishment must be sought in that state, not one into which a convict may have escaped.⁹⁷

§ 434. — The Right of Appeal

Procedural due process does not require an appellate review.⁹⁸ A state may, by statute, grant one, but this does not, *ipso facto*, exalt this into a constitutional right.⁹⁹ This assumes, of course, that the trial court provided all that procedural due process requires.¹⁰⁰ States must, however, provide a method permitting a defendant to show a denial of due process, at the very least, and have this passed upon by an appellate court.¹⁰¹ For example, a deferred motion for a new trial, or a writ of *habeas corpus*, or an ordinary appeal, or a writ of *coram nobis*, may be permitted, and the Supreme Court may then grant certiorari to review.¹⁰² This right may, however, be waived. "When federal rights are involved, it is, of course, for this Court finally to determine whether the failure to follow the procedure designed by a State for their protection constitutes a waiver of them. . . . [W]hen the waiver is founded on a failure to comply with the appellate practice of a State, the question turns on whether that practice gives litigants 'a reasonable opportunity to have the issue as to the claimed right heard and determined' by the state court. . . . Illinois practice of requiring constitutional questions to

patient died. 147 N.Y.L.J. #97, p. 4, May 18, 1962.

95. *O'Neil v. Vermont* (1892) 144 U.S. 323, 12 S.Ct. 693, 36 L.Ed. 450, *Louisiana ex rel. Francis v. Resweber* (1947) 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422; see esp. *Robinson v. California* (1962) 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758.

96. *Brown v. Mississippi* (1936) 297 U.S. 278, 285, 286, 56 S.Ct. 461, 80 L.Ed. 682.

97. *Sweeney v. Woodall* (1952) 344 U.S. 86, 73 S.Ct. 139, 97 L.Ed. 114.

98. *The Dohany case*, *supra* note 43.

99. *National Union of Marine Cooks & Stewards v. Arnold* (1954) 348

U.S. 37, 43, 75 S.Ct. 92, 99 L.Ed. 46, although Black and Douglas dissented, feeling that it is "merely the final step in the judicial process in trying cases and therefore cannot be so conducted as to deny that 'due process' which the Fourteenth Amendment requires." P. 45.

100. *Ohio ex rel. Bryant v. Akron Metropolitan Park District* (1930) 281 U.S. 74, 80, 50 S.Ct. 228, 74 L.Ed. 710.

101. *Young v. Ragen* (1949) 337 U.S. 235, 69 S.Ct. 1073, 93 L.Ed. 1333.

102. *Taylor v. Alabama* (1948) 335 U.S. 252, 68 S.Ct. 1415, 92 L.Ed. 1935.

be taken directly to the Illinois Supreme Court and of refusing to review them if review was first sought in the [intermediate] Appellate Court satisfied the request. We adhere to that decision. The channel through which constitutional questions, raised by petitioner in his attack on the amended order, could have been taken all the way to this Court was not only clearly marked, it was also open and unobstructed."¹⁰³

In the federal jurisdiction an indigent federal prisoner has an absolute right, in good faith, to a full appeal, and does not have to pay the costs, unless the government meets the burden of proving the appeal raises such frivolous issues that it would be dismissed without argument regardless of who pays the costs.¹⁰⁴ A state must, in a reasonable degree, likewise so comply if it grants a right of appeal to all accused persons.¹⁰⁵

Not alone is the suppression of appeal documents a due process violation,¹⁰⁶ but there is likewise alleged a denial of due process where fraud is charged on the part of the prosecutor and a substitute court reporter in preparing the transcript for appeal from a conviction.¹⁰⁷

§ 435. — Post-Conviction Safeguards

A lawyer is undoubtedly necessary in the post-trial and in the sentencing stages, and is vitally necessary in the appellate phases.¹⁰⁸ After the jury has rendered a verdict there may be

103. *Parker v. Illinois* (1948) 333 U.S. 571, 574-575, 68 S.Ct. 708, 92 L.Ed. 886.

104. *Coppedge v. United States* (1962) 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21; the good faith requirement of the statute, 28 U.S.C. § 1915(a), should be considered in the light of an objective, not subjective, standard.

105. *Griffin v. Illinois* (1956) 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891, *Eskridge v. Washington State Board, etc.* (1958) 357 U.S. 214, 78 S.Ct. 1061, 2 L.Ed.2d 1269, *Burns v. Ohio* (1959) 360 U.S. 252, 79 S.Ct. 1164, 3 L.Ed.2d 1209.

106. *Cochran v. Kansas* (1942) 316 U.S. 255, 62 S.Ct. 1068, 86 L.Ed. 1453.

107. *Chessman v. Teets* (1955) 350 U.S. 3, 76 S.Ct. 34, 100 L.Ed. 4, and see connected case in § 435, note 108, *infra*.

108. *Chessman v. Teets* (1957) 354 U.S. 156, 77 S.Ct. 1127, 1 L.Ed.2d 1253 (lawyer required at hearing

to determine correctness of record for appeal). See note 107, *supra*, for earlier case.

On a state's recidivist statute, i. e., one which provides that when it appears a person, convicted of an offense, has been previously sentenced to a like punishment, he may be tried on an information so charging and if so found then he may be additionally sentenced, a prisoner is entitled to counsel during the information and trial stages of this type of hearing. If refused counsel a due process violation occurs. *Chewning v. Cunningham* (1962) 368 U.S. 443, 82 S.Ct. 498, 7 L.Ed. 2d 442. But where a defendant does have counsel in such a proceeding, even though advance notice of the hearing is not given, but where no request for an adjournment or continuance is made for the purpose of preparation, no due process violation occurs. *Oyler v. Boles* (1962) 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446.

On motions for new trials see, e. g., *United States v. Soblen* (S.D.N.Y.

involved motions for new trials, or of different applications, and some adequate procedure or remedy appears to be a constitutional requirement. For example, the Illinois procedure for handling claims of a constitutional deprivation of due process incurred the written condemnation of three Justices in 1947,¹⁰⁹ so that in 1949 that state enacted a Post-Conviction Remedies Act,¹¹⁰ but there appears to be some remaining questions as to its adequacy.¹¹¹

Another situation is the possibility of a judicial inquiry as to the prisoner's insanity where an application therefor is supported by facts and buttressed by good reasons.¹¹² There is no due process violation where the judge who sentences conducts an *ex parte* investigation, for this phase is to be separated from the proceedings to this point,¹¹³ but the constitutional prohibitions against cruel and unusual punishment (§ 433) here apply.¹¹⁴ However, taking into consideration a previous conviction in a similar case, and now imposing the death penalty, is no ground for a due process claim, nor is the *ex parte* obtaining of defendant's prior history of crimes.¹¹⁵ There is, of course, a possible *ex post facto* violation if a later statute increases the punishment (§ 416).

§ 436. — — Federal Review

Under 28 U.S.C.A. § 2241 (a) et seq., the Supreme Court, any Justice, the district courts and any circuit court judge, may grant a writ of *habeas corpus*. Subd. (c) (3) prevents the writ from being issued to a prisoner unless "He is in custody in violation of the Constitution or laws or treaties of the United States," and if in custody due to a state court's judgment he must have first "exhausted the remedies available in the courts of the State, or . . . there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect" his rights.¹¹⁶ A denial of counsel, for ex-

1961) 203 F.Supp. 542, 562-567, and § 420, note 42, *supra*.

109. *Marino v. Ragen* (1947) 332 U.S. 561, 68 S.Ct. 240, 92 L.Ed. 170, concurring opinion of Justice Rutledge (Douglas and Murphy joining).

110. Ill.Rev.Stat.1959, c. 38, §§ 828-832.

111. *Jennings v. Illinois* (1951) 342 U.S. 104, 111-112, 72 S.Ct. 123, 96 L.Ed. 119.

112. See, e. g., the contrary situation, *Phyle v. Duffy* (1948) 334 U.S. 431, 68 S.Ct. 1131, 92 L.Ed. 1494; also see *United States ex rel. Smith v. Baldi* (1953) 344 U.S. 561, 73 S.

Ct. 391, 97 L.Ed. 549, and *Solesbee v. Balkcom* (1950) 339 U.S. 9, 70 S.Ct. 457, 94 L.Ed. 604.

113. *Williams v. New York* (1949) 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337.

114. See, e. g., *Weems v. United States* (1910) 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793.

115. *Williams v. Oklahoma* (1959) 358 U.S. 576, 79 S.Ct. 421, 3 L.Ed. 2d 516, and *Williams v. New York*, *supra* note 113.

116. 28 U.S.C.A. § 2254. This is a codification of the Hawk rule, enunciated in *Ex parte Hawk* (1944) 321 U.S. 114, 116, 64 S.Ct. 448, 88

ample, is a jurisdictional due process violation permitting *habeas corpus* or *coram nobis*, assuming exhaustion of state remedies.¹¹⁷ The exhaustion doctrine includes certiorari to the Supreme Court from a state's highest court, otherwise a federal district court cannot entertain an application for the writ.¹¹⁸

In an "extraordinary" 1962 case the facts were: Noia, Bonino, and Caminito were convicted twenty years ago under New York's felony murder statute; at the trial only the confessions of all three were offered by the state; defense counsel objected because of coercion in obtaining these; the jury convicted defendants but recommended clemency, their verdict thus implying a finding the confessions were not involuntary; B. and C. appealed, but their appeals were not upheld, and neither sought certiorari of the Supreme Court; later C. twice moved the state's highest court for reargument, no time limit preventing this; after the second denial for reargument, certiorari was sought but denied; now C. petitioned the federal district court, claiming a denial of due process by the use against him of coerced confessions; in 1955 the 2d Circuit upheld this claim and consequently his conviction was held void, the Supreme Court denying certiorari; thereupon B. sought state reargument, in 1956, which was granted, the conviction reversed, and a new trial ordered; neither B. nor C. has since been re-tried, and are free even though subject to indictment, as their confessions were the only evidence against them; N. never appealed, so that reargument could not be had in the Court of Appeals in the state, and he therefore moved in the *nisi prius* court to set aside his conviction, and this was granted but later reversed by the appellate court because of lack of jurisdiction, since no appeal had originally been taken; N. thereupon sought habeas corpus in the federal district court which reluctantly dismissed the petition be-

L.Ed. 572. In *Marino v. Ragen* (1947) 332 U.S. 561, 569, fn. 10, 68 S.Ct. 280, 92 L.Ed. 170, the court said: "For example, petitioner might allege that he had inadequate time to prepare his defense, that the trial court denied him counsel, and that a forced confession was used as evidence at the trial. The first allegation could be made only by writ of error because the crucial dates would be a matter of record; the second only by habeas corpus, if at all, because the trial court is presumed to know what is in the record and he would certainly know that he had refused to appoint counsel; and the third allegation only by *coram nobis* because the facts would be unknown to the

trial court. Perhaps none of the allegations considered separately would establish a deprivation of due process, yet with the whole picture before the court a violation of constitutional rights would be apparent."

117. *United States v. Morgan* (1954) 346 U.S. 502, 74 S.Ct. 247, 98 L.Ed. 248; the *Hawk* case, *supra* note 116, at pp. 117-118; *Brown v. Allen* (1953) 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469.

118. *Darr v. Burford* (1950) 339 U.S. 200, 70 S.Ct. 587, 94 L.Ed. 761; see also *Brown v. Allen* (1953) 344 U.S. 443, 73 S.Ct. 420, 97 L.Ed. 469 (failure to file appeal within time allowed).

cause N. had not exhausted his available state remedies in that he had not appealed, and his explanation (insufficient funds) was an insufficient excuse; the 2d Circuit (2-1) reversed, in an extended and exhaustive opinion which analyzed: (1) the waiver aspect (not appealing); (2) the exhaustion requirement (under § 2254); and (3) the question of there being an independent and adequate state, rather than solely federal, ground of decision.¹¹⁹ The majority termed this "a case so unique" and of such an "exceptional nature" as to be considered an "extraordinary case," and they quoted with approval the district court's language that N. was being held in a "patently unconstitutional detention."¹²⁰

§ 437. — Military Law

The only question here involved in state military law is whether procedural due process limits it in any way. In § 346 we discussed the federal military law in a like aspect, and what was said there applies here for the state national guard is under federal control, directly or indirectly as circumstances require.

119. These are the three major grounds upon which the federal courts generally refuse to act, although the exhaustion doctrine does not require the exhaustion of inadequate remedies. The Marino case, *supra* note 116, at p. 570, fn. 12, giving citations.

120. *United States ex rel. Noia v. Fay* (2d Cir. 1962) 300 F.2d 345, 357, 365, 350, cert. granted (1962) 369 U.S. 869, 82 S.Ct. 1140, 82 L. Ed.2d 274. See, on this, the simultaneous unanimous holding by the Supreme Court that a prisoner, without a lawyer on the trial and on appeal, and whose appeal was thrown out by the Ohio courts because he had used the wrong method, "is without a state remedy to challenge his conviction," so that he may now raise federal constitutional issues through federal habeas

corpus. *Mattox v. Sacks* (1962) 369 U.S. 656, 82 S.Ct. 992, 8 L. Ed.2d 178. Cf., however, *John Reid v. Connecticut* (1962) 369 U.S. 854, 82 S.Ct. 941, 8 L. Ed.2d 12, decided with the other two, rejecting certiorari where Reid tried unsuccessfully to replace a public defender, who did not object to a confession Reid now claimed was coerced, and which contention the state courts held was therefore waived. His efforts in the federal courts were also unsuccessful. See also *United States ex rel. Benjamin Reid v. Richmond* (D.C.Conn.1960) 197 F. Supp. 125 (2d Cir. 1961) 295 F.2d 83, cert. den. (1961) 368 U.S. 948, 82 S.Ct. 390, 7 L. Ed.2d 344 (Douglas feeling otherwise), rehear. den. (1962) 368 U.S. 979, 82 S.Ct. 485, 7 L. Ed.2d 441.

Chapter XX

THE EQUAL PROTECTION CLAUSE

§ 440. The Concept of Equal Protection

The background of the 14th Amendment (Chapter XVI), the analysis of the P & I Clause (Chapter XVII), and the analyses of the substantive (Chapter XVIII) and procedural (Chapter XIX) aspects of the Due Process Clause, all point to a general conclusion that this new, and heretofore not enunciated, Equal Protection Clause was inserted in the 1868 amendment to make doubly, and even triply, certain that rights and procedures would be assured, and this to all persons¹ regardless of race, i. e., if there is anything definite in any of the three Clauses concerning prohibitions upon racial discrimination, it is most easily found here. But, as the sections which follow disclose, nonracial situations became the meat upon which this clause early fed,² then came a judicial recognition of the efficacy of the clause in striking down racial discrimination, and by the 1954 Desegregation Cases (§§ 460-461) the clause was returned to its historic function as well. In other words, the Due Process and Equal Protection Clauses (perhaps, later, the P & I clauses) today are of prime importance in federal control of state activities, and with the Commerce Clause constitute a trilogy of judicial weapons to keep local efforts under control.

Since the Due Process Clause has been given much greater emphasis in this connection, as between it and the Equal Protection Clause, it is commonplace to ignore or downgrade the latter, but "There is obviously a close relationship between those cases striking down statutes because they classify unreasonably and those in which laws are declared unconstitutional simply because they are unreasonable. Cases involving the constitutionality of ordinances limiting business hours indicate how either ground can be easily used" ³ But, as Professor Frank has re-

1. Corporations are included, *Connecticut General Life Ins. Co. v. Johnson* (1938) 303 U.S. 77, 88, fn. 14, 58 S.Ct. 436, 82 L.Ed. 673, citing *Gulf, Colorado & S. F. Ry. Co. v. Ellis* (1897) 165 U.S. 150, 154, 17 S.Ct. 255, 41 L.Ed. 666, per Black, dissenting; so are people of all colors and religions, nationalities and races, as well as aliens, non-residents, etc., e.g., the *Yick Wo* case, *infra*, note 7. Inasmuch as the Black-Douglas argument

against the non-application of the 14th Amendment to corporations has already been discussed in § 386, we do not discuss it further here.

2. See, e.g., *Holden v. Hardy* (1898) 169 U.S. 366, 18 S.Ct. 383, 42 L. Ed. 780.

3. Paulsen, *The Persistence of Substantive Due Process*, 34 *Minn.L. Rev.* 91, 93 (1950). In general, see also Frank and Munro, *The Orig-*

marked, "doubtless because due process did the job very satisfactorily from the standpoint of its creators, there was never the same impulse to expand equal protection,"⁴ and so judicial interest did not, until recently at least, manifest itself in any overmuch use of equal protection.

It should not be thought that only in the 14th Amendment do we find equal protection concepts. For example, in the Constitution itself, there is "equal protection" given to all states in the requirement that each have two senators (Art. I, § 3, cl. 1); that "all Duties, Imposts and Excises shall be uniform throughout the United States (Art. I, § 8, cl. 1);⁵ that "No Preference shall be given . . . to the Ports of one State over those of another" (Art. I, § 9, cl. 6); and that Full Faith and Credit, and state P's & I's, be granted equally to all within their mandates (Art. IV, §§ 1, 2, cl. 1). And in the Amendments other than the 14th we find equal protection concepts, e. g., apart from the Bill of Rights, the 15th concerning voting, and ditto as to the 19th.⁶

Equal protection is thus not a new concept, nor is it a strange one. Its content was somewhat described by Justice Field in 1884, when he wrote that

"This clause undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice no different or higher punish-

inal Understanding of "Equal Protection of the Laws," 50 Col.L.Rev. 131 (1950), and Tussman & TenBroek, *The Equal Protection of the Laws*, 37 Calif.L.Rev. 341 (1949).

4. Cases and Materials on Constitutional Law (1952 rev.) p. 405.

5. This applies only to geographical uniformity. *Knowlton v. Moore* (1900) 178 U.S. 41, 108, 20 S.Ct. 747, 44 L.Ed. 969: "But what the Constitution commands is the imposition of a tax by the rule of geographical uniformity, not that in

order to levy such a tax objects must be selected which exist uniformly in the several States."

6. See also *Antieau*, *Equal Protection Outside the Clause*, 40 Calif.L. Rev. 362 (1952).

Mention should also be made of the prohibitions against bills of attainder, Art. I, § 9, cl. 3, and Art. I, § 10, cl. 1, which prevent the singling out of individuals or groups against whom discriminatory legislation is specifically directed. See § 308.

ment should be imposed upon one than such as is prescribed to all for like offenses. . . . Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.”⁷

Two years later the court wrote of the three Clauses that “These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.”⁸ In 1921 Chief Justice Taft put it even more forcefully, and pointed out the interconnection between due process and equal protection:

“The [equal protection] clause is associated in the Amendment with the due process clause, and it is customary to consider them together. It may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous. The due process clause brought down from Magna Charta was found in the early state constitutions and later in the 5th Amendment to the Federal Constitution as a limitation upon the executive, legislative, and judicial powers of the Federal government, while the equality clause does not appear in the 5th Amendment, and so does not apply to congressional legislation. . . . Our whole system of law is predicated on the general fundamental principle of equality of application of the law. ‘All men are equal before the law;’ ‘This is a government of laws, and not of men;’ ‘No man is above the law,’—are all maxims showing the spirit in which legislatures, executives, and courts are expected to make, execute, and apply laws. . . .

“The [equal protection] guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process.”⁹

Several thoughts emerge from this brief analysis: first, that the Equal Protection Clause seeks the same ends as does the Due

7. *Barbier v. Connally* (1884) 113 U. S. 27, 5 S.Ct. 357, 28 L.Ed. 923, quoted in *Yick Wo v. Hopkins* (1886) 118 U.S. 356, 367–368, 6 S.Ct. 1064, 30 L.Ed. 220. See also the dissent of Justice Bradley in the *Slaughter-House Cases* (1873) 16 Wall. 36, 122, 21 L.Ed. 394.

8. *The Yick Wo case*, *supra* note 7, at p. 369.

9. *Truax v. Corrigan* (1921) 257 U.S. 312, 331–333, 42 S.Ct. 124, 66 L.Ed. 254.

Process Clause; second, that in certain instances they may be used interchangeably; third, that in a degree they may overlap; fourth, that any fact-situation must thus take into account substantive and procedural due process, as well as equal protection; fifth, that equal protection requires a preliminary question to be answered, based upon the statements above quoted that "equal protection and security should be given to all under like circumstances," and concerning "like circumstances," and "similarly situated," namely, whether the persons acted upon are "under like circumstances" or are "similarly situated;" sixth, that where unlike or different circumstances or situations exist, as a factual and legal datum, then different or unequal treatment may be accorded;¹⁰ seventh, that where these unlike circumstances so exist, states may so arrange or classify the persons involved and accord unequal treatment to them; and, eighth, that in so treating either such group the concepts of procedural and substantive due process, mentioned at the outset, still apply.

The approach¹¹ to equal protection thus necessarily requires due process substantive (§ 442) and procedural (§ 443) to be considered, and then the most important element within equal protection, namely, the unlike or different circumstances which permit these unlike or different persons to be placed in a separate category or classification and to be treated differently or unequally (§§ 444-446). Only then do we reach the question, is equal protection being extended to all persons who so come within a permissible (large or small) group or classification (§ 447)? Since classification looms so large upon the picture thus painted, we devote many illustrative sections to it (§§ 448-463), seeking thereby to indicate in what manner these particular classifications are upheld or denounced. The consequences of a denunciation are treated (§ 464) as, finally, are the limitations upon classification (§§ 465-466).

10. See, for analogous treatment of the 4th Amendment's "unreasonable" term, that "reasonable" searches and seizures are not condemned, §§ 337, 424-426; here, where people in "like circumstances" must be treated equally, the coin-face also is that if they are in unlike circumstances they need not be treated equally. And so with property and other items.

11. Tussman & tenBroek, *supra* note 3, at pp. 342-343, write that "Crit-

icism of legislation [under the clause] has moved along several lines. First, it has operated as a limitation upon permissible legislative classification. This is its most familiar role. Second, it is used to oppose 'discriminatory' legislation. And third, it shares with due process the task of imposing 'substantive' limits upon the exercise of the police power."

§ 441. — The Federal Jurisdiction—The 5th Amendment's Due Process Clause

There is no federal limitation based upon an equal protection term or clause as such to be found in the constitution or the amendments; as we saw in § 440, concepts and approaches analogous to equal protection are found, but insofar as a specific equal protection federal limitation is involved, there is none.¹² "Unlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress."¹³ One conclusion to be drawn from this difference is that the states are subjected to a limitation not found or used against the federal government, so that a broader degree of judicial supervision is able to be exercised locally than nationally. How correct is this?

Several contrary points of view may be suggested, however, although none is any proof that an equal protection limitation is available as against the federal government. For example (and this illustration is analogous to scratching one's left ear with his right hand behind his head), the Commerce Clause was used by the federal judiciary to strike down state segregation laws based upon color, the argument being the requirement of national uniformity, or unduly burdening interstate commerce, or federal regulations which required equal treatment,¹⁴ but it will be noticed that these cases are decided before the 1954 Desegregation Case (see § 460). The point now being made is that where the judiciary desired to accomplish some end then the means were simply found; so, if the Supreme Court seeks, an equal protection concept may easily be found in some other limiting power or clause

Another contrary point of view has already seen judicial daylight, for Cardozo wrote, concerning the all-important concept of classification, that the particular "act of Congress is therefore valid, so far at least as its system [classification] of exemptions is concerned, and this though we assume that discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment."¹⁵ But his views

12. *Currin v. Wallace* (1939) 306 U. S. 1, 59 S.Ct. 379, 83 L.Ed. 441; see, however, *United States v. Yount* (N.D.Pa.1920) 267 F. 861.

13. *Detroit Bank v. United States* (1943) 317 U.S. 329, 337, 63 S.Ct. 297, 87 L.Ed. 304; *Helvering v. Lerner Stores Corp.* (1941) 314 U.S. 463, 468, 62 S.Ct. 341, 86 L.Ed. 343; see also Stone's dissent in *Heiner v. Donnan* (1932) 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 772.

14. *Hall v. De Cuir* (1877) 95 U.S. 485, 24 L.Ed. 547; *Morgan v. Vir-*

ginia (1946) 328 U.S. 373, 66 S.Ct. 1050, 90 L.Ed. 1317; *Bob-Lo Excursion v. Michigan* (1948) 333 U.S. 28, 68 S.Ct. 358, 92 L.Ed. 455 (foreign commerce).

15. *Steward Machine Co. v. Davis* (1937) 301 U.S. 548, 585, 57 S.Ct. 883, 81 L.Ed. 1279. The quotation below is at p. 584. See also *Sunshine Anthracite Coal Co. v. Adkins* (1940) 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263.

were not limited solely to this, for he also considered the analogous question of similar legislation under the Equal Protection Clause: "If this latitude of judgment is lawful for the states, it is lawful, a fortiori, in legislation by the Congress, which is subject to restraints less narrow and confining. The classifications and exemptions directed by the statute now in controversy have support in considerations of policy and practical convenience that cannot be condemned as arbitrary. The classifications and exemptions would therefore be upheld if they had been adopted by a state and the provisions of the Fourteenth Amendment were invoked to annul them."

A third point of view was enunciated by Chief Justice Taft in 1921, by Chief Justice Stone in 1943 and then followed through by Chief Justice Warren in 1954. The first Chief Justice wrote that the 5th Amendment "tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty, and property, which the Congress or the Legislature may not withhold;" the second felt that the 5th Amendment "restrains only such discriminatory legislation by Congress as amounts to a denial of due process;" and the last wrote as follows: "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process." ¹⁶

In all of the situations mentioned the court has paid lip service to the federal non-applicability of any equal protection clause under the 5th Amendment, and has then proceeded to render justice as it felt required, whether under one or another federal limiting clause; and, in the last of the above three quotations, the entire bench in effect agreed to permit "judicial equal protection," in place of any limiting "clause equal protection," to become a prohibition upon the federal government. Obviously, therefore, while there is no actual equal protection limitation *per se* upon the

16. The *Truax* case, *supra* note 9, at p. 331; *Hirabayashi v. United States* (1943) 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774; *Bolling v. Sharpe* (1954) 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884.

In a later but companion case to the *Hirabayashi* one, *Korematsu v.*

United States (1944) 323 U.S. 214, 235, 65 S.Ct. 193, 89 L.Ed. 194, Justice Murphy's dissent was based upon his view that the federal law deprived "all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment."

federal government, there are equal protection concepts which limit it through other clauses or through judicial power.¹⁷

§ 442. The Approach to Equal Protection—Due Process Substantive

Whether at the outset of the attack upon a statute, or ultimately when the question of a denial of equal protection is raised (§ 447), there is always present the power of a state (or the federal government) to do what it wants to do. No question is now raised concerning those upon whom the statute is to act or affect, whether these persons (or property) are, for example, all the persons within its jurisdiction, or only a selected few. It is a question of power to do, or power to affect, and we have already discussed this extensively throughout the previous chapters. Assuming no question of equal protection, or of classification, or of procedural due process, is present or even enters the picture, still the question of the state's power or jurisdiction is ever-present. Thus, to illustrate, in a case later discussed in § 458, Justice Holmes remarks that "The attack is . . . upon the substantive law. It seems to be contended that in no circumstances could such an order be justified. It certainly is contended that the order cannot be justified upon the existing grounds."¹⁸

§ 443. — Due Process Procedural

Just as with substantive, so with procedural, due process—we can assume there is nothing pertaining to equal protection involved, and yet procedural due process of law is a good basis for attacking a statute. For example, railroads have been singled out for special legislation, whether to aid or not to aid, from their early appearance upon the American scene, but, usually, no equal protection claim emerges as all railroads are equally affected; and yet a statute cannot create a procedural evidentiary presumption that a railroad is negligent, merely because of the occurrence of an accident, because there is no reasonable basis for and no rational connection between what is proved and what is inferred.¹⁹ Or even if we proceed to a particular group being affected, any one person therein may claim that he is not receiving procedural due process. For example, although we discuss the case at greater length in § 459, we may refer to Chief Justice Stone's concurrence on the ground that "I think the real question we have to consider is not one of equal protection, but whether the wholesale condem-

17. See, for illustrations of numerous cases involving this approach, Corwin, ed., *The Constitution of the United States* (1953) pp. 853, 1141 et seq.

18. *Buck v. Bell* (1927) 274 U.S. 200, 207, 47 S.Ct. 584, 71 L.Ed. 1000.

19. *Western & A. Rr. v. Henderson* (1929) 279 U.S. 639, 49 S.Ct. 445, 73 L.Ed. 884; see also §§ 413 and 422.

nation of a class to such an invasion of personal liberty, without opportunity to any individual to show that his is not the type of case which would justify resort to it, satisfies the demands of due process.”²⁰

In the former situation equal protection was not involved or considered, so that procedural due process could be utilized at the outset; in the latter situation we assumed that equal protection was involved but, within this class or group now being so equally treated, an individual should receive procedural due process to show he did not come within the group. And a third illustration might show that even when concededly within a group, the individual is nevertheless entitled to procedural due process before his life, liberty or property can be taken from him.²¹

§ 444. — Classification—The Jugular Vein

Up to this section we have been talking of “groups,” “like circumstances,” “similarly situated,” and analogous terms, but we also saw, in § 440, that where persons (or property) were not similarly circumstanced they were not constitutionally required to receive equal treatment or protection. This term, “classification,” is, as this section entitles it, the jugular vein of equal protection.²² The term as such is not necessarily the only one denoting what is meant or involved; for example, a statute may speak of an “exception,” or a “proviso,” or a “limitation,” and even when no particular term of classification is found the statute may nevertheless be so interpreted.²³

“The right to legislate implies the right to classify,”²⁴ and “From the very necessities of society, legislation of a special character, having these [police power] objects in view, must often be had in certain districts Special burdens are often necessary for general benefits”²⁵ In other words, general legislation which applies to all persons (or property), and gives or takes equally from all, is contrasted with special legislation which applies to less than all persons, and gives or takes special burdens

20. *Skinner v. Oklahoma* (1942) 316 U.S. 535, 544, 62 S.Ct. 1110, 86 L. Ed. 1655. Justice Jackson concurred “in holding that the hearings provided are too limited in the context of the present Act to afford due process of law.” At p. 546.

21. See, e. g., §§ 460–463.

22. For example, Tussman & Ten-Broek, *supra* note 3, at pp. 343–356, devote 14 pages of a 40-page article to its analysis; see also case-books, texts, and articles in which equal protection is so developed.

23. See, e. g., for an “exception,” *Morey v. Doud* (1957) 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485, where it was held an unconstitutional classification for purposes of equal protection.

24. Frankfurter, concurring, in *Martin v. City of Struthers* (1943) 319 U.S. 141, 154, 63 S.Ct. 862, 87 L.Ed. 1313.

25. The *Barbier* case, *supra* note 7.

to or from this special group. "It is of the essence of a classification that upon the [special] class are cast duties and burdens [or benefits and grants] different from those resting upon the general public [T]his inequality of right in the courts, is of no significance upon the question of constitutionality. Indeed, the very idea of classification is that of inequality so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality." ²⁶

Classification is thus not only permitted to but is even required of a legislature; indeed, the economy and the government could not continue without a degree of permitted classification. Here is the nub of the situation, that is, the degree of permitted classification. In effect, we ask whether there can be classification of the persons and items involved, and then to what extent or degree can this classification penetrate.

Phrased differently, a classification itself must be reasonable or natural under the particular circumstances involved.²⁷ If it is arbitrary or capricious, or if there is no reasonable relation to the objects to be accomplished, or if it runs afoul a specific constitutional prohibition, or if a federal power is unduly affected, then such a classification is denounced. There need not be "abstract symmetry" in a classification, so that a state "may mark and set apart the classes and types of problems according to the needs and as dictated or suggested by experience."²⁸ By classification we thus do not mean "a pedagogical requirement of the impracticable. The equal protection of the laws does not mean that all occupations that are called by the same names must be treated in the same way. The power of the State 'may be determined by degrees of evil or exercised in cases where detriment is especially experienced.' It may do what it can to prevent what is deemed an evil and stop short of those cases in which the harm to the few concerned is thought less important than the harm to the public that would ensue if the rule laid down were made mathematically exact."²⁹ All this does not mean that a classification which might

26. *Atchison, Topeka & Santa Fe Rr. Co. v. Matthews* (1899) 174 U.S. 96, 106, 19 S.Ct. 609, 43 L.Ed. 909.

27. See, e. g., analysis in note 22 citation, *supra*.

28. The *Skinner* case, *supra* note 20, at p. 540.

29. *Dominion Hotel, Inc. v. Arizona* (1919) 249 U.S. 265, 268, 39 S.Ct. 273, 73 L.Ed. 597, per Holmes. The Justice was never a strong supporter of the equal protection concept insofar as classification, and its reasonableness, was involved. Two cases may point this up.

In 1911 he wrote for upholding a state's power to levy assessments upon the daily deposits of state banks to create a depositors' guaranty fund. "It is asked whether the state could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise." *Noble State Bank v. Haskell* (1911) 219 U.S. 104, 112, 31 S.Ct. 186, 55 L.Ed. 112.

otherwise be reasonable and permissible is able to drag along a substantive power of the state not ordinarily upheld. Brandeis phrased it as follows:

"In passing upon legislation assailed under the equality clause we have declared that the classification must rest upon a difference which is real, as distinguished from one which is seeming, specious, or fanciful, so that all actually situated similarly will be treated alike; that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the state; and that the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote or negligible. Subject to this limitation of reasonableness, the equality clause has left unimpaired, both in range and in flexibility, the state's power to classify for purposes of taxation. Can it be said that the classification here in question is unreasonable?" ³⁰

The mere fact that hardship will result is not sufficient to void an otherwise valid classification; there is seldom a law which does not, in some measure, result in hardship to some. And the mere fact that the classification is a quantitative one "is not necessarily unreasonable. There are many instances where it has been sustained. We think it not unreasonable in this instance. With good reason the legislature may have thought that an association of less than twenty persons would have only a negligible influence and be without the capacity for harm that would make regulation needful." ³¹

How can the question of what is a reasonable and permissible classification thus be approached? In § 445 a suggestion is made to the practitioner on how to handle this major problem, but here we may use the words of others. "There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things." ³²

In 1927 he wrote for upholding a state law which permitted sterilization of mental defectives (procedural due process was not involved) where three generations had so occurred. "But, it is said, however it might be if this reasoning were applied generally, it fails when it is confined to the small number who are in the institutions named and is not applied to the multitudes outside. It is the usual last resort of constitutional arguments to point

out shortcomings of this sort." The Buck case, *supra* note 18, at p. 208.

30. *Quaker City Cab Co. v. Pennsylvania* (1928) 277 U.S. 389, 406, 48 S.Ct. 553, 72 L.Ed. 927, dissenting.

31. *New York ex rel. Bryant v. Zimmerman* (1928) 278 U.S. 63, 77, 49 S.Ct. 61, 73 L.Ed. 184.

32. *Magoun v. Illinois Trust & Savings Bank* (1898) 170 U.S. 283, 296, 18 S.Ct. 594, 42 L.Ed. 1037. See also *Railway Express Agency, Inc. v.*

For example, a law is attacked and, *inter alia*,

"the contention is made that it is arbitrary in its classification, and consequently denies the equal protection of the laws to those whom it affects.

"The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal-protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." ³³

"To these rules we add the caution that 'Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.' " ³⁴

There is, however, a supplemental approach which must be referred to, and that concerns the task of the judiciary. The courts

New York (1949) 336 U.S. 106, 110, 69 S.Ct. 463, 93 L.Ed. 533, where a law prevented all advertising upon trucks but exempted owners of trucks and permitted their vehicles to carry their own business advertising; one contention was that regular commercial advertising and also this permitted type of advertising would both cause distraction to other drivers, and so the classification was bad. Said the court, in upholding the law, that the local authorities might have concluded otherwise. "It would take a degree of omniscience which we lack to say that such is not the case. . . . We cannot say that that judgment is not an allowable one. Yet if it is, the classification has relation to the purpose for which it is made and does not contain the kind of discrimination against which the Equal Protection Clause affords protection. It is by such

practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered. . . . It is no requirement of equal protection that all evils of the same genus be eradicated or none at all."

33. *Lindsley v. Natural Carbonic Gas Co.* (1911) 220 U.S. 61, 78-79, 31 S. Ct. 337, 55 L.Ed. 369, per Van Devanter. See also the suggestion black-lettered by Rottschaefer, *Handbook of American Constitutional Law* (1939) p. 551: "The reasonableness of a classification can be determined only by considering its purpose, the policy to be promoted thereby, and the relation of the resulting differences in treatment to those factors."

34. *Morey v. Doud* (1957) 354 U.S. 457, 464, 77 S.Ct. 1344, 1 L.Ed.2d 1485.

recognize that the "mathematical certainty" or, rather, "uncertainty" rule must be applied, which in practice means that no black or white extremes are usually found. "The line must still be drawn between . . . particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment."³⁵ Or, where a specific constitutional or Amendment provision, e. g., the 21st Amendment, creates or recognizes a classification, this cannot be held forbidden by the 14th Amendment.³⁶

§ 445. — — — A Suggestion Concerning Classification

A classification, say the cases, must be reasonable, natural, or rationally related to the end, and words similar or analogous to these may be used; in these instances the special groupings are upheld. However, "The constitutional command . . . sets a goal not attainable by the invention and application of a precise formula. This Court has never attempted that impossible task."³⁷ Illustrations of "natural" classifications may easily be given; for example, sex (§ 448), age (§§ 449–450), and matters concerning height and weight (§§ 451–452) may be used to set up groups of individuals. Illustrations of rationally related and reasonable classifications are not as simple, for the ends or purposes, for example, must be considered. However, assuming these do exist, then income bracketing (§ 453), or hours (§ 459) and wages (§ 455), fall into place, as do types of occupations (§ 456), all of which permit classifications thereon and therein. When, however, the broad fields of economic (§ 457) and criminal (§ 459) regulations are considered, simplicity and *prima facie* reasonableness are then not necessarily present. Since both the proponent (the legislature) and the opponent (the person affected) are so vitally concerned, how can they seek to support or denounce any classification?

The mere fact that a classification is natural does not automatically entitle it to acceptance. For example, pigmentation or color is allegedly natural, a characteristic of the environment, and

35. *Helvering v. Davis* (1937) 301 U.S. 619, 640, 57 S.Ct. 904, 81 L.Ed. 1307. See also the *Morey* case, *supra* note 34, at p. 473, where Frankfurter's dissent inveighed against reliance by the majority upon two decisions which "manifest the requirement of nondiscriminatory classification as an exercise in logical abstractions."

36. *State Board of Equalization v. Young's Market Co.* (1936) 299 U.S. 59, 64, 57 S.Ct. 77, 81 L.Ed. 38.

37. *Kotch v. Board of River Port Pilot Commissioners* (1947) 330 U.S. 552, 556, 67 S.Ct. 910, 91 L.Ed. 1093.

therefore it should follow that this may become a valid basis for classification (§ 460). However, factors other than color enter into the consideration of this one element in the total picture, so that such a natural basis for classification may nevertheless not be judicially acceptable (§ 461). Or a geographical classification, based upon history and tradition, may fall before the necessities of current requirements (§ 462); or one based upon race, aside from color, may still be objectionable because of many opposing reasons (§ 463). In other words, nature is not always right—at least in man-utilized classification schemes.

Similarly is a classification not necessarily acceptable because it is rational and even reasonable, under all the circumstances, because a constitutional or other statutory mandate requires differently; and public policy, as judicially interpreted, is a most important reason for rejection (§§ 465–466).

The preceding illustrations and references have “argued” the validity of the classification; that is, the attorney has read the statute’s language and now urges the court to accept or reject the proposed base or structure because of reasons suggested above. Additionally, counsel may create his own logical approach, using history, experience, and reason, to uphold or denounce a classification. But suppose sex is the basis? Is this not natural? Can anyone attack the classifications of men and of women, and then act thereon? The answer is that a constitutional provision may, as has been suggested, prevent this in a particular case, e. g., voting (19th Amendment), or be so interpreted, e. g., minimum wages;³⁸ but where judicial interpretation is required for any such provision or statute, then the judges may be influenced by changed conditions, different policy considerations, or by facts outside their personal and judicial knowledge.

For example, if liberty of contract required invalidation of state efforts to fix maximum hours for a particular group of workers who, or whose occupations, were not within its police powers,³⁹ then women logically could not be singled out for special treatment where general factory employment was involved; how, therefore, uphold such a law? The legalistic approach, based upon precedents, offered little hope, and so the natural classification had to be shown either to be inapplicable

38. The 14th Due Process “liberty applied to a contract of employment, and thus denounced a minimum wage statute for women in *Adkins v. Children’s Hospital* (1923) 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785, reversed in *West Coast Hotel Co. v. Parrish* (1937) 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703.

39. *Lochner v. New York* (1905) 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937, but holding rejected thereafter, e. g., *Bunting v. Oregon* (1916) 243 U.S. 426, 37 S.Ct. 435, 61 L.Ed. 830, and see the *Parrish* case, *supra* note 38.

or unacceptable in this particular and limited area. The famous "Brandeis Brief" utilized this last approach, and it presented factual evidence, i. e., learned authorities through writings, and "expressions of opinion from other than judicial sources," to persuade the court that a substantial and reasonable basis existed for the "widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil."⁴⁰

As the preceding case stated, "when a question of fact is debated and debatable," outside sources of necessity must become large or determining factors in the court's decision. For example, in the usual automobile personal injury and property damage case, a lawyer does not argue that, liability conceded, then his layman client's testimony is alone sufficient to support a personal injury and property damage verdict; the lawyer does not even ask the court to take judicial notice of anything on these items, for he knows that he must obtain a physician and a mechanic, each an expert in his own field, to testify as to facts, estimates, and opinions. Where not contradicted or inherently improbable, or where these questions of fact are decided in plaintiff's favor, the estimates and opinions of these two witnesses must be accepted by the court, and its verdict must be based upon these now-facts in the case. So with classifications which depart from established norms, or where existing ones may be claimed to be inadequate or now to be denounced, factual and opinion evidence by people in these particular fields must be offered into evidence. This is the lawyer's job, to offer such evidence, and it is also suggested that his job includes also the analysis of the classification, the reasons behind it, what it seeks to accomplish, and the expert testimony required for his position in court.⁴¹

For example, a statute classifies red cedar trees as those being and not being infected by cedar rust, and seeks to destroy these latter under certain conditions. Why? The legislature feels that cedar rust menaces and destroys, unless it itself is checked, other and more desirable property. Upon what basis?

40. *Muller v. Oregon* (1908) 208 U.S. 412, 420, 28 S.Ct. 324, 52 L.Ed. 551: "The legislation and opinions referred to in the margin may not be, technically speaking, [legal] authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief" quoted in the text. "Constitutional questions, it is true, are not settled by even a consensus of present public opin-

ion At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long-continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of judicial knowledge."

41. See, e.g., the *Lindsley* case, *supra* note 33, at pp. 79-80.

Testimony before its committees, or called to their attention by authorities in the particular field, i. e., entomologists. Is this testimony legally sufficient? "As shown by the evidence [in this case] and as recognized in other cases involving the validity of this statute," the answer is yes.⁴² All these approaches and methods are disclosed in a 1924 case upholding a statute which prohibited the employment of women between the hours of ten p. m. and six a. m.

"The legislature had before it a mass of information from which it concluded that night work is substantially and especially detrimental to the health of women. We cannot say that the conclusion is without warrant. The loss of restful night's sleep cannot be fully made up by sleep in the daytime, especially in busy cities, subject to the disturbances incident to modern life. The injurious consequences were thought by the legislature to bear more heavily against women than men; and, considering their more delicate organism, there would seem to be good reason for so thinking. The fact, assuming it to be such, properly may be made the basis of legislation applicable only to women. Testimony was given upon the trial to the effect that the night work in question was not harmful; but we do not find it convincing. Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker. The state legislature here determined that night employment of the character specified was sufficiently detrimental to the health and welfare of women engaging in it to justify its suppression; and, since we are unable to say that the finding is clearly unfounded, we are precluded from reviewing the legislative determination."⁴³

In brief, there is seldom a proposed or an existing classification which cannot be approached (pro or con) through the eyes of a specialist in the field, whether the specialist be an engineer, or a physicist, or an economist, or someone else. Lawyers, and courts, are not omniscient, do not study these areas intensively, and must rely upon all men and all fields in order to decide cases. All knowledge comes within the witness-box, and the judges must seek enlightenment from all men. For example, a Council of Economic Advisers counsels the national government since 1946,

42. *Miller v. Schoene* (1928) 276 U.S. 272, 278, 48 S.Ct. 246, 72 L.Ed. 468.

43. *Radice v. New York* (1924) 264 U.S. 292, 294-295, 44 S.Ct. 325, 68

L.Ed. 690 (referring to the *Muller* case, *supra* note 40), an unanimous decision.

and the original bill desired to have their opinions become mandates for national economic purposes; the projected trip to the moon is in the hands of physicists and engineers, as is the plunge to the depths of the ocean; in the states there are usually (semi?) autonomous boards of education, police and fire departments, and hosts of local functions likewise carried on by specialists.

The approach to classification is thus suggested to be a non-legal one, that is, the lawyer should obtain specialists in the particular area or field involved who will testify as to the facts, voice opinions, and give the court enlightenment upon the subject; then, from this base, the court can determine if a reasonable relation exists between these facts and views and the end to be accomplished, and this from a common-sense, reasonable-man point of view (which, when the cases are read, is what the courts have been attempting to do since 1908).

§ 446. — — Subclassification

Up to now we have been speaking of a classificatory scheme based upon the bifurcation of a whole; but does this mean that one classification is all that is legally permitted? The law does not prevent subclassifications, that is, the further classification of a group previously classified. For example, we classify all the people in the country into men and women (sex); then all the men are further (sub)classified into men 65 and over, and those below 65 (age); those below are now further (sub-sub)classified into those who have worked and those who have not worked (occupations, perhaps); etc. This merely illustrates what may be done, for we can, for example, also subclassify practically all property, e. g., into realty and personalty, the latter into tangibles and intangibles, etc., and also classify practically all rights, e. g., into constitutional and non-constitutional, non-constitutional into statutory and non-statutory, etc.

Just as with the original classification, each subsequent subclassification must stand upon its own, and be upheld or denounced upon the basis of what has heretofore been discussed (although, obviously, once a major classification has been initially upheld its subclassifications strike easier ground to hoe). One possible exception to this appears to be that since the purpose of the legislation is passed upon at the outset, and also substantive due process and police power requirements, then thereafter these may possibly be ignored. This is error. What may be sufficient for one classification may not be for another; or, the purpose in supporting the first classification or subclassification may be insufficient to support the second. And so with substantive due process and police power arguments. From a practical (and even theoretical) point of view, it may be wise to assume each (sub)-

classification is completely divorced from its preceding one (to the extent they are not interdependent and mutually supportable) and handle it on its own.

§ 447. — Equal Protection (or Equal Discrimination)

We have discussed substantive (§ 442) and procedural (§ 443) due process, and especially classification (§§ 444–446), as essential elements in the consideration of any equal protection case; where and when, as well as how, therefore, does equal protection enter? Assuming no due process defect, substantive or procedural, and assuming all classifications and subclassifications to be sufficient, the state now seeks to apply power to, or affect on behalf of or against, all the selected and special few persons or items. No questions of due process or classification now enter, for we have taken care of this initially; however, these may have been held over to the present moment, or they may be now re-examined in the light of new subclassifications, so that even a valid latter will not save a law which is either without the state's powers or prohibited by some limitation. Regardless, we assume all such questions answered, and the state seeks to apply power, etc. It is now, and only now, that equal protection enters, for whatever it is that the state does must be done equally to all within this special classification.

If the state gives one person within this class a benefit, all must receive the benefit equally; if the state deprives one such person of a benefit, all must be deprived equally; in other words, there must be equal protection for all, that is, equal benefits and equal discrimination, distributed equally to all within the classified group. Stated differently, whether the special group is given a plus or a minus, insofar as we contrast it with all other groups, this plus or minus must be equally distributed to all within the class. It may be spread thick or thin, and so long as it is spread uniformly, no complaint under equal protection *per se* can be made.

Generally speaking, there is no equal protection argument as such ordinarily available to the persons in the classification affected; not, it is hastily added, because it is not constitutionally present for use, but, rather, because the statutes usually do treat all within the classification equally; of course a good statute may nevertheless be poorly administered, but this is a question of fact.⁴⁴ The main thrust is directed against the classification, as-

44. The early case of *Yick Wo v. Hopkins* (1886) 118 U.S. 356, 373, 6 S.Ct. 1064, 30 L.Ed. 220, involved just this situation. There all laundries in wooden buildings could not be operated without a license, and

this was a classification separated from brick or stone buildings (but, also pointed out the court, a subclassification also existed as to the former, namely, those carrying on their businesses at the caprice of

suming power (substantive) and procedure are present, or else to show that the person does not come within the classification. We have developed the former aspect, that is, the reasonableness, etc. of the classification; the latter, on an individual basis, obviously does not lend itself to generalization. Particular cases disclose the arguments, however, and on both aspects the sections which follow illustrate these approaches.

§ 448. Illustrations of Classification—Sex

We have already noted that sex may be a valid classification and that women may be treated differently than men. This was apparently said generally in 1908 in upholding an Oregon law which limited the work a woman could do in a laundry to ten hours a day.⁴⁵ Simultaneously, however, the court reaffirmed its earlier holding that men could not receive the same treatment, i. e., a general ten-hour day law preventing more hours a day in bakeries was held invalid as to men.⁴⁶ The reasoning behind upholding the 1908 classification may be said to be a two-fold one, chivalry, and the perpetuation of the race. As to the first, the court felt that "It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him . . . [for] she is so constituted that she will rest upon and look to him for protection;" as to the second, the court felt "that her physical structure and a proper discharge of her maternal functions—having in mind not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. This difference [in structure, function, etc.] justifies a difference in legislation, and upholds that which is designed to compensate for some of the burdens which rest upon her."⁴⁷

the licensor, and those being unable so to carry on). The classification was not denounced but its application was, "For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners as, to all other persons. . . . Though the law itself be fair on its face and impartial in

appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

45. The Muller case, *supra* note 40.

46. *Ibid.*, at pp. 419, 423, "without questioning in any respect the decision in *Lochner v. New York* . . . *supra* note 39.

47. The Muller case, *supra* note 40, at pp. 422, 422-423, and at p. 423 referring to "the inherent difference between the two sexes, and in the different functions in life which they perform."

The first reason need not detain us; the second, it will be noted, was based upon women's physical function involving the future race, and a fear that any impairment of this function could cause harm, so that this justifies a difference in legislation, i. e., classification; but then, continued the court, the substantive (or police) power of the state, and for the same reason, now "upholds that which is designed to compensate for some of the burdens which rest upon her," i. e., restricting her to ten hours of work a day in laundries.

But a valid classification for hours is not necessarily a valid classification for wages, at least in the absence of evidence as to a connection between function and required income, especially when the constitutional command of liberty of contract, and the 19th Amendment's equality in voting, are considered. This, in effect, was the court's view in 1923,⁴⁸ although eleven months later it sustained a general night-work prohibition for women.⁴⁹ In other words, women's hours could be touched under the police powers, but not their wages, at least in the absence of a reasonably proved connection or relation between their functions and their wages. In 1936 this was still the court's view, although the dissents were becoming more powerful,⁵⁰ and by the following year the old cases were overruled and minimum wages for women were upheld, the former gaps having been filled, i. e., "The minimum wage to be paid . . . is fixed after full consideration by representatives of employers, employees, and the public. It may be assumed that the minimum wage is fixed in consideration of the services that are performed in the particular occupations under normal conditions."⁵¹

48. Between 1908 and 1923 the 19th Amendment was ratified in 1920, and it rejected sex as a reason for voting inequality. In 1923 the Supreme Court had a federal District of Columbia minimum wage up before it. There was testimony by a girl of 21 that she worked short hours, the work (elevator operator) was light and healthful, the surroundings clean and moral, she earned the most she was capable of and could receive, and the minimum wage order deprived her of employment. The court felt the statute to be "simply and exclusively a price-fixing law, confined to adult women . . . , who are legally as capable of contracting for themselves as men," and thus infringed upon their liberty of contract; further, that "The price fixed by the board . . . is based wholly on the opinions of the members as to what will be necessary to provide

a living wage for a woman, keep her in health, and preserve her morals. It applies to any and every occupation The standard . . . is so vague as to be impossible of practical application" The reference to the 19th Amendment caused Holmes, in his dissent, to remark: "It will need more than the 19th Amendment to convince me that there are no differences between men and women, or that legislation cannot take those differences into account." The Adkins case, *supra* note 38, at pp. 554, 555, and 569-570.

49. The Radice case, *supra* note 43.

50. E. g., Chief Justice Hughes, in *Morehead v. New York ex rel. Tipaldo* (1936) 298 U.S. 587, 629-630, 56 S.Ct. 918, 80 L.Ed. 1347.

51. The West Coast Hotel case, *supra* note 38, at p. 396, Chief Jus-

Sex is thus a basis for classification, and even though women may be the equal of men in many ways, this "does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic. The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards."⁵² So, in the *Barmaid Case*, a statute was upheld which classified owners of liquor establishments into those in cities of 50,000 or more and those in cities below, then subclassified the former on the basis of sex (then in effect subclassified male owners into those who were married and those not married, and the married ones into those having daughters and those not having daughters, and undoubtedly the daughters into those of a certain minimum age and those below), and then permitted a male owner to employ his wife or daughter as a barmaid; or, from another point of view, the statute classified cities as above, required bartenders in the larger ones to be licensed, subclassified them further by sex, and then forbade any females so to act, although now still further subclassifying them into those whose husband or father owned a bar, and the others, and finally permitting the former to be licensed but not the latter.⁵³ Or, in a 1924 case, cities were classified into first and second class, as well as others; in the former two, people were then classified by sex; females were subclassified into those over or under 16; the former then into those who worked in restaurants and those who did not; the former again into those who worked as singers, performers, or attendants, as well as those who worked in hotel kitchens or dining rooms or employer-operated restaurants, and the rest; and these latter were now prevented from working between ten p. m. and six a. m.⁵⁴

This does not exhaust the possibilities of classificatory schemes in this area, e. g., § 450 discloses this too, but sufficient has been set forth to permit the analysis of other fact situations.

tice Hughes now writing for the majority (the minority also disagreeing as to the unproved assumption). Since then general minimum wage legislation has been upheld. *United States v. F. W. Darby Lumber Co.* (1941) 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609, the Commerce Clause providing the constitutional base.

52. *Goesaert v. Cleary* (1948) 335 U.S. 464, 466, 69 S.Ct. 198, 93 L.Ed. 163.

53. *Ibid.*; the minority felt that the "inevitable result of the classifica-

tion belies the assumption that the statute was motivated by a legislative solicitude for the moral and physical well-being of women who, but for the law, would be employed as barmaids. Since there could be no other conceivable justification for such discrimination against women owners of liquor establishments, the statute should be held invalid as a denial of equal protection." At p. 468.

54. The *Radice* case, *supra* note 43, at p. 296, where some of these classifications are discussed and upheld.

§ 449. — Age—Minors and Infants

It requires no citations to point out that minors may be classified by age for a variety of purposes, e. g., compulsory education, after school work permits, prohibitions of any work to a certain age, half-price fares or lower admission prices, no fares for infants, and that federal legislation exists for aid to dependent children, apprentice and training programs, etc. Furthermore, in many states, minors between 18 and 21, when carrying on a business, may be held to their business contracts. The range of classifications is limited only by the number of days or years one desires to use as a dividing line, and special legislation is usually upheld.⁵⁵

§ 450. — — Social Security

Social security offers an illustration of not alone age but also of other bases for classifications and subclassifications. For example, age is so well known that 65 has become an automatic reference point for retirement. But other age classifications are found, as women may retire at 62, and there are earlier ages depending upon other conditions (classifications) and requirements, e. g., disability, when it drops to 50. A wife is entitled to benefits on her husband's account if she is 62 (if reversed, he must be 65), assuming other factors present, or if not, has in her care a child under 18. Insurance benefits are paid to or for children under 18, again payable to widows 62 and over (widowers must be 65 or over), assuming other factors present, and parents (again 65 and 62) are entitled to survivors benefits also. As seen, sex is also used, for different treatment is accorded men and women; so, too, a distinction is made between those who were employed and those who were not, for while the former may be entitled to old age benefits, the latter may receive only old age assistance; even those employed are further classified into currently employed and not, and the former are additionally subclassified as fully insured or not. The recent disability classification permits covered men and women to be entitled to benefits if disabled as per the statutory requirements.⁵⁶

§ 451. — Selective Service—In General

This area of analysis offers an excellent opportunity to disclose, on a basis of personal experience to millions of students, the complexity and the nature of the classifications and subclassifications here found. For example, we start with sex, for only males

55. See, e. g., Forkosch, *A Treatise on Labor Law* (1953) pp. 214-215.

56. See *Social Security Handbook*, with supplement for 1960 amend-

ments. There are, obviously, dozens and scores of additional subclassifications and qualifications, here impossible to develop further.

are draftable. Then age enters, and so on, as § 452 demonstrates. Here we are concerned with another aspect, namely, how the individual can show he is classified improperly and so escape the call. Of course his first course is within the selective service system, but suppose he is overruled and affirmed on all internal appeals. The ultimate judicial method is either a defense in a criminal action by the government, or *habeas corpus* after induction. As to the first, the *Estep* case permits a registrant to defend on the ground that the induction order was invalid, there because he alleged he was a duly ordained minister of religion.⁵⁷ As to the second, perhaps the ultimate scope of review is found in a situation where, in effect, although entering a disclaimer, the court did examine slightly the question "whether specific assignments to duty [within the army] fall within the basic classification of petitioner."⁵⁸

§ 452. — — Classifications and Subclassifications

As we saw in § 451, the population in the country is first classified by sex, with only males subject to the call. The men are divided (not necessarily in the order here discussed) according to allegiance, e. g., aliens and others who reside here but are not subjects, as yet, of this country, with only those subject to the draft being next further subdivided by age. For example, upon reaching a minimum age the youngster must register, but until then he is not required so to do. Registration places him into another category, for now up to a certain age he is subject to be called, assuming nothing further intervenes. However, marriage subclassifies him still further, as does an educational deferment. Even if he is within the callable age bracketing he may plead religious or other convictions, or be exempted for a variety of reasons (classifications). But now he is further classified on a physical basis, and is put into one of several categories. Without proceeding further, this "pie" of originally-eligible young males is sliced and re-sliced so many times that finally but a thin slice of eligibles is available for duty. And we do not go into the further classifications the armed forces themselves engage in!

§ 453. — Taxes—Income and Other

Taxes are a nation's life-blood, and the states are similarly so circumstanced. Equality is a standard difficult to fix, and almost

57. *United States v. Estep* (1946) 327 U.S. 114, 66 S.Ct. 423, 90 L.Ed. 567; *Witmer v. United States* (1955) 348 U.S. 375, 75 S.Ct. 392, 99 L.Ed. 428; *Dickinson v. United States* (1953) 346 U.S. 389, 74 S.Ct. 152, 98 L.Ed. 132 (reversing a conviction).

58. *Orloff v. Willoughby* (1953) 345 U.S. 83, 93, 73 S.Ct. 534, 97 L.Ed. 842. See, for further discussion, Forkosch, *A Treatise on Administrative Law* (1956) § 338.

impossible to maintain. States "are not confined to a formula of rigid uniformity in framing measures of taxation. They may tax some kinds of property at one rate, and others at another, and exempt others altogether. They may lay an excise on the operations of a particular kind of business, and exempt some other kind of business closely akin thereto."⁵⁹ There is no "iron rule of equality" imposed by the Equal Protection Clause, "prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise scientific uniformity with reference to composition, use or value."⁶⁰ Thus, for example, a chain store occupation tax was upheld which taxed an owner \$15 for each store between two and five (inclusive), \$25 for those between five and ten, and in increasing amounts to the last bracket of \$200 for stores over fifty.⁶¹

Corporations are not entitled to equal protection save in the states where created or after they have been admitted. "After a state has chosen to domesticate foreign corporations, the adopted corporations are entitled to equal protection with the state's own corporate progeny, at least to the extent that their property is entitled to an equally favorable ad valorem tax basis."⁶² This does not mean that corporations within the state may not be treated differently than others, e. g., an assessment upon the nominal or face value of corporate securities, instead of upon their actual value, was upheld, and Justice Bradley wrote:

"[The state may adjust] its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different

59. *Steward Machine Co. v. Davis* (1937) 301 U.S. 548, 584, 57 S.Ct. 883, 81 L.Ed. 1279 (citations omitted).

60. *Allied Stores of Ohio v. Brown* (1959) 358 U.S. 522, 526-527, 79 S. Ct. 437, 3 L.Ed. 480. "To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure." *Ohio Oil Co. v. Conway* (1930) 281 U.S. 146, 159, 50 S.Ct. 310, 74 L.Ed. 775, quoted in the *Allied Stores* case, at p. 527. See also *Lawrence v. State Tax*

Commissioner of Mississippi (1932) 286 U.S. 276, 283-284, 52 S.Ct. 556, 76 L.Ed. 1102.

61. *Great Atlantic & Pacific Tea Co. v. Grosjean* (1937) 301 U.S. 412, 57 S.Ct. 772, 81 L.Ed. 1193; see also *State Tax Commissioners v. Jackson* (1931) 283 U.S. 527, 51 S.Ct. 540, 75 L.Ed. 1248.

62. *Wheeling Steel Corp. v. Glander* (1949) 337 U.S. 562, 571-572, 69 S. Ct. 1291, 93 L.Ed. 1544. If there is a tax discrimination imposed as part of the condition for entering the state, this is upheld. *Lincoln National Life Ins. Co. v. Read* (1945) 325 U.S. 673, 65 S.Ct. 1220, 89 L.Ed. 1861.

trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying that the XIV Amendment was not intended to compel the States to adopt an iron rule of equal taxation.”⁶³

Income or other taxes, both federal and state, classify and subclassify to excruciating extremes. For example, unemployment insurance taxes involve exemptions and exceptions, as do those for other types of social security purposes.⁶⁴ Inheritance taxes may classify almost at will, provided only the classification is rested upon some basis of difference and that it have a fair and substantial relation to the purpose of the legislation, equality in treatment of each class being assumed.⁶⁵ Income taxes illustrate subclassification to an extreme, since not alone is a qualitative and a quantitative aspect upheld,⁶⁶ but there are also different tax rates laid upon single and married people, with or without dependents, and according to the number of dependents; also types and forms of contributions, deductions, income, and practically all else going into any long form of return.

§ 454. — Maximum Hours and Generally

Hours and wages are one the “multiplier and the other the multiplicand” in any discussion of maximums and minimums, for

63. *Bill's Gap R. R. Co. v. Pennsylvania* (1890) 134 U.S. 232, 237, 10 S.Ct. 533, 33 L.Ed. 892. See further, on discriminations between life and casualty companies being upheld, whether foreign or domestic corporations, *Metropolitan Casualty Co. v. Brownell* (1935) 294 U.S. 580, 55 S.Ct. 538, 79 L.Ed. 1070.

64. *Carmichael v. Southern Coal & Coke Co.* (1937) 301 U.S. 495, 57 S.Ct. 868, 81 L.Ed. 1245 (employers of eight or more taxed).

65. *Stebbins v. Riley* (1925) 268 U.S. 137, 45 S.Ct. 424, 69 L.Ed. 884.

66. See, e. g., *Walters v. City of St. Louis* (1954) 347 U.S. 231, 74 S.Ct. 505, 98 L.Ed. 660.

"The bargain is equally affected whichever half you regulate."⁶⁷ A true or pure hours law would set a maximum of hours which could be worked, regardless of any overtime provisions for double pay, etc.; these pure laws are generally found in carrier legislation, where "The length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends."⁶⁸ Decisions involve numerous classifications for hours of labor, e. g., those in which federal navy yard employees were given a ten-hour day in 1840; the 1868 declaratory eight-hour day for laborers, workmen and mechanics "employed by or on behalf of the government;" state efforts (1842) limiting children under 12 to ten hours a day, and of women (1847) to a like amount; federal and state legislation concerning hours of employment on carriers, albeit primarily a safety measure; employees of contractors for the government, with the government now acting in a proprietary capacity;⁶⁹ and we have already discussed the general wage-hour legislation. Despite liberty of contract pleas, mine workers were treated separately and differently in 1898 and maximum hours legislation on their behalf upheld,⁷⁰ as it was for night work for women, with subclassifications here, too, involved (§ 448). In other words, maximum hours legislation, whether of the pure type applied to selected groups or the wage-hour type which really impose higher wage costs where workers are required to work overtime, may classify in numerous ways and for a variety of reasons.

§ 455. — Minimum Wages and Generally

We have already discussed minimum wages to a degree in §§ 445, 448, and 454, and have seen women, children, and occupations treated differently because of different classifications. We do not go too far into the payment of wages as such, but may refer to the generally accepted distinctions between day and night, outside and inside, and dangerous and non-dangerous work, as classifications which private industry, as well as the government, feels is sufficient to warrant a different pay;⁷¹ so, too, concern-

67. The Adkins case, *supra* note 38, respectively at p. 564 (Taft) and 569 (Holmes), both dissenting.

68. *Baltimore & Ohio R. R. Co. v. I. C. C.* (1911) 221 U.S. 612, 619, 31 S.Ct. 621, 55 L.Ed. 878.

69. All these aspects are developed at length, with numerous citations and references, in Forkosch, *Labor Law*, *supra* note 55, pp. 131-156.

70. *Holden v. Hardy*, *supra* note 2.

71. See also the Adkins case, *supra* note 38, at pp. 546-551, giving illustrations of state controls so exercised, and at p. 547 stating: "Statutes prescribing the character, methods, and time for payment of wages. Under this head may be included [cases] sustaining a state statute requiring coal to be measured for payment of miners' wages before screening; sustaining a Tennessee statute requiring the redemption in cash of store orders

ing length of service, with subclassifications here also as to position, number of years, etc. The national wage and hour law does not cover all workers, so that states must enact their own laws; "thirty jurisdictions [by 1953] have minimum wage legislation upon their statute books, applying only to women, to women and girls, to women and minors, and seven including men in their coverage."⁷²

§ 456. — Occupations and Businesses—Types Of

In discussing classifications for tax purposes (§ 453) we saw different types of businesses, qualitatively and quantitatively, subjected to different and even special legislation. In § 448 the Barmaid Case disclosed a permissible classification and regulation because of the liquor business there involved. And in pointing up why workers in mines and in bakeries were to be treated differently, at least at the turn of the century and insofar as hours of work were concerned, we saw that it was because of the difference in their occupations, just as we saw (§ 455) differences in pay for night work, etc.

"Thus, classifications have been sustained which are based upon differences between fire insurance and other kinds of insurance; between railroads and other corporations; between barber-shop employment and other kinds of labor; between 'immigrant agents' engaged in hiring laborers to be employed beyond the limits of a state and persons engaged in the business of hiring for labor within the state; between sugar refiners who produce the sugar and those who purchase it. More directly applicable are recent decisions of this court sustaining hours of labor for women in hotels, but omitting women employees of boarding houses, lodging houses, etc.; and limiting the hours of labor of women pharmacists and student nurses in hospitals, but excepting graduate nurses."⁷³

Sometimes a classification is upheld despite a claim of monopoly or nepotism resulting therefrom, as in the New Orleans Pilotage case. There the State Board was composed exclusively of pilots, and this board could certify appointments to the governor, but only those who had served a six-months' apprenticeship under a licensed pilot could be so certified; since the licensed pilots refused to apprentice any but relatives and close friends, no "outsiders" could become pilots. The law and the practice

issued in payment of wages; upholding a statute regulating the time within which wages shall be paid to employees in certain specified industries; and other cases sustaining statutes of like import and effect."

72. Forkosch, *Labor Law*, supra note 55, at p. 210.

73. The Radice case, supra note 43, at pp. 296-297, citations omitted.

were nevertheless upheld, because "pilotage . . . is a unique institution and must be judged as such." ⁷⁴

Occupational distinctions may thus be upheld and yet equal protection may still be flouted, as in the *Yick Wo* case, which denounced an ordinance making it unlawful for laundries to be maintained in wooden buildings, because "the facts shown established an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that . . . they are applied . . . with a mind so unequal and oppressive as to amount to a practical denial" of equal protection.⁷⁵ So, too, in refusing a pawnbroker's license to aliens, here a Japanese,⁷⁶ although a state may require that only citizens be hired by contractors who do work for it.⁷⁷

§ 457. — Economic Regulations

The Supreme Court has followed somewhat of a broadly similar course in interpreting the economic aspects of the Due Process and Equal Protection Clauses. That is, the court at first interpreted due process so as initially to fetter the states, changing in the 1930's to permit much that had formerly been denounced. So, with equal protection, but here the court's denunciation involved the classification for economic purposes. In 1897 a majority felt that railroads could not be singled out by statute and required to pay attorney's fees in law suits, its opinion bristling with numerous references to and quotations from other state and federal decisions, causing it finally to remark: "It must not be understood that by citing we indorse all these decisions. Our purpose is rather to show the extent to which the courts of the various states have gone in enforcing the constitutional obligation of equal protection." ⁷⁸ In 1901 a Kansas statute classified stockyards upon the basis of business done, and then reduced and fixed the prices which the major stockyards could charge. The opinion by Justice Brewer spent pages discussing the concept of a business affected with a public interest, and the reasonableness of the charges, before stating that "it is not necessary to rest our de-

74. The *Kotch* case, *supra* note 37, at pp. 557-558, per Black, J., with Justices Rutledge, Reed, Douglas, and Murphy dissenting. In the *Barmaid* case, *supra* note 52, Justices Rutledge, Douglas and Murphy again dissented (Reed going over to the majority).

75. *Yick Wo v. Hopkins*, *supra* note 44.

76. *Asakura v. City of Seattle* (1924) 265 U.S. 332, 44 S.Ct. 515, 68 L.Ed. 1041.

77. *Heim v. McCall* (1915) 239 U.S. 175, 36 S.Ct. 78, 60 L.Ed. 206.

78. *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis* (1897) 165 U.S. 150, 165, 17 S.Ct. 255, 41 L.Ed. 666; see also *Atchison, Topeka & S. F. Ry. Co. v. Vosburg* (1915) 238 U.S. 58, 35 S.Ct. 675, 59 L.Ed. 1200. The court in the first case, at pp. 165-166, also referred to the requirement that a classification must bear a just and proper relation to the classification, and not be merely an arbitrary selection.

cision upon this [due process] consideration, which was not fully discussed by counsel, but pass to" the equal protection one involving the classification. Six Justices concurred in overturning the statute, their entire "opinion" being "upon the ground that it applies only to the Kansas City Stock-Yards Company, and not to other companies or corporations engaged in like business in Kansas, and thereby denies to that company the equal protection of the laws."⁷⁹

The change in policy began about the second decade of this century, e. g., upholding the classification in a workmen's compensation law which made its coverage applicable only to employers of five or more, and exempted all employers below that number of employees,⁸⁰ the various wage and hour laws discussed in §§ 444, 454-455, the exemption of agricultural associations from a state's antitrust criminal provisions.⁸¹ It is a fair statement that today the Supreme Court will denounce economic regulations which are based solely upon an invidious classification, as shown in the economic discrimination against individuals because of nationality or race, e. g., voiding a state law requiring employers of five or more to hire not less than eighty percent qualified electors or native-born Americans, and voiding a law which barred lawfully admitted Japanese the opportunity to earn a living as commercial fishermen off the California coast;⁸² it is also a fair statement to say that business and property do not receive this same consideration, e. g., permitting a price differential in sales to stores between advertised and unadvertised milk, upholding a statute preventing life insurance company agents from engaging in the undertaking business, even though affecting only one such company, forbidding below cost sales but permitting trading stamps to be given where sold at cost.⁸³

79. *Cotting v. Kansas City Stock Yards Co.* (1901) 183 U.S. 79, 102, 114-115, 22 S.Ct. 30, 46 L.Ed. 92. See also *Connolly v. Union Sewer Pipe Co.* (1902) 184 U.S. 540, 559-563, 22 S.Ct. 431, 46 L.Ed. 679, denouncing an Illinois statute which exempted a group in the same general area and permitted this special class to engage in monopolistic activities; overruled in the *Tigner* case, *infra* note 81.

80. *Jeffrey Manufacturing Co. v. Blagg* (1915) 235 U.S. 571, 35 S.Ct. 167, 59 L.Ed. 364.

81. *Tigner v. Texas* (1940) 310 U.S. 141, 60 S.Ct. 879, 84 L.Ed. 1124.

82. *Truax v. Raich* (1915) 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131, *Taka-*

hashi v. Fish & Game Commission (1948) 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478; see also the *Yick Wo* case, *supra* note 44, and *cf.* *Terrace v. Thompson* (1923) 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255 (upholding a land purchase law), with *Oyama v. California* (1948) 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249 and the *Takahashi* case (see note 145, *infra*).

83. *Borden's Farm Products Co. v. Ten Eyck* (1936) 297 U.S. 251, 56 S.Ct. 453, 80 L.Ed. 669; *Daniel v. Family Security Ins. Co.* (1949) 336 U.S. 20, 69 S.Ct. 550, 93 L.Ed. 532; *Safeway Stores, Inc. v. Oklahoma Retail Grocers' Ass'n* (1959) 360 U.S. 334, 79 S.Ct. 1196, 3 L.Ed.2d 1280.

There are thus economic classifications which are upheld, despite the entrepreneurial hardship occasioned thereby, even if religious considerations are involved,⁸⁴ and those which are denounced, perhaps because of the entrepreneurial hardship occasioned, regardless of the public's hardship;⁸⁵ although how, then, reconcile this last approach with one upholding a classification because "The project was designed to benefit people, not land."⁸⁶

§ 458. — Miscellaneous

There are numerous other types of classifications, good or bad, which may be used for illustrative purposes. For example, in condemnation proceedings, a state "may classify those whose property is taken and allow the one class expenses not granted to another," and the state may also "classify litigation and adopt one type of procedure for one class and a different type for another."⁸⁷ So, too, a state may require non-business corporations, of twenty or more members, which require an oath for membership, other than unions and fraternal organizations, to file copies of its constitution, by-laws, membership roster, etc. In upholding such a law the court said:

"The main contention made under the equal protection clause is that the statute discriminates against the Knights of the Ku Klux Klan and other associations in that it excepts from its requirements several associations having oath-bound membership, such as labor unions, the Masonic fraternity, [etc.] . . . [The state courts held] that the classification was justified by a difference between the two classes of associations shown by experience, and that the difference consisted (a) in a manifest tendency on the part of one class to make the secrecy surrounding its purposes and membership a cloak for acts and conduct inimical to personal rights and public welfare, and (b) in the absence of such a tendency on the part of the other class."⁸⁸

An interesting situation is the 1927 Sterilization Case, in which Holmes remarked that "Three generations of imbeciles are

84. Four cases, all in 1961, *McGowan v. Maryland*, *Two Guys, etc. v. McGinley*, *Braunfield v. Brown*, and *Gallagher v. Crown Kosher Market*, respectively in 366 U.S. 420, 582, 599, 617, 81 S.Ct. 1101, 1135, 1144, 1122, 6 L.Ed.2d 393, 551, 563, 536. The court split on the religious issue but was unanimous on the equal protection one.

85. *Morey v. Doud*, *supra* note 23.

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86. *Ivanhoe Irrigation District v. McCracken* (1958) 357 U.S. 215, 297, 78 S.Ct. 1174, 2 L.Ed.2d 1313.

87. *Dohany v. Rogers* (1930) 281 U.S. 362, 369, 50 S.Ct. 299, 74 L.Ed. 904.

88. *New York ex rel. Bryant v. Zimmerman* (1928) 278 U.S. 63, 73, 75, 49 S.Ct. 61, 73 L.Ed. 184.

enough." There a grandmother, a mother, and an illegitimate child, all feeble-minded, were within a state institution; a law permitted the superintendent, whenever he "shall be of opinion that it is for the best interests of the patients and of society that an inmate under his care should be sexually sterilized, he may have the operation performed upon any patient afflicted with hereditary forms of insanity, imbecility, etc., on complying with" detailed procedures. "The attack is not upon the procedure but upon the substantive law." This was rejected, the three generations statement being here made.

"But, it is said, however it might be if this reasoning were applied generally, it fails when it is confined to the small number who are in the institutions named and is not applied to the multitudes outside. It is the usual last resort of constitutional arguments to point out shortcomings of this sort. But the answer is that the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow. Of course so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached."⁸⁹

Somewhat analogous are the Psychopathic Personality and the Habitual Criminal cases, the latter discussed in § 459 and the former here. The state permitted confinement of those persons having a psychopathic personality after due procedures (here held good); the term was defined to relate to those whose emotional behaviour, etc. were such "as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons." Apart from other questions of substantive and procedural due process, the equal protection argument was also rejected because there was a "rational basis for such a selection" of this class of persons.

"Whether the legislature could have gone farther is not the question. The class it did select is identified by the state court in terms which clearly show that the persons within that class constitute a dangerous element in the community which the legislature in its discretion could put under appropriate control. As we have often said, the legislature is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. If the law 'presumably hits the evil where

89. *Buck v. Bell* (1927) 274 U.S. 200, 207, 206, 207, respectively, 47 S.Ct. 584, 71 L.Ed. 1000. The mother, Carrie, was the second of the three

generations, and both she and her mother were in the institution; it is assumed her child was with Carrie.

it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.' ”⁹⁰

War, as we have already seen, upholds many things which saner moments condemn; thus the Japanese Relocation Cases permitted this group to be singled out for special treatment when hostilities began,⁹¹ although simultaneously with the second decision upholding this program, an American citizen of Japanese ancestry was held entitled to her freedom as the Authority had received no delegation to detain concededly loyal citizens.⁹²

§ 459. — Criminal Statutes

The Habitual Criminal case “touches a sensitive and important area of human rights,” said Justice Douglas in opening his opinion, for the state “deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring.” This occurred, under the Oklahoma statute, when a person convicted two or more times for crimes “amounting to felonies involving moral turpitude,” whether in or out of Oklahoma, was thereafter convicted of such a felony in that state and sentenced to one of its penal institutions. One provision made offenses under “the prohibitory laws, revenue acts, embezzlement, or political offenses,” not able to be considered. Skinner stole chickens in 1926; three years later he engaged in robbery with firearms; in 1934 he again robbed with firearms; all three times he was convicted and served time in Oklahoma. He was in prison when the act was passed in 1935, and in 1936 proceedings thereunder were instituted against him. The court disregarded all arguments but the equal protection one, pointed to the many inconsistencies under the classifications of the statute, and denounced it.⁹³

Other cases in this area are those voiding the inability of poor (as against rich) defendants to obtain transcripts for an appeal without charge where these are necessary before the appellate

90. *Minnesota ex rel. Pearson v. Probate Court* (1940) 309 U.S. 270, 272, 274, 274–275, 60 S.Ct. 523, 84 L.Ed. 744.

91. *Hirabayashi v. United States* (1943) 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774; *Korematsu v. United States* (1944) 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194.

92. *Ex parte Endo* (1944) 323 U.S. 283, 65 S.Ct. 208, 89 L.Ed. 243.

93. *Skinner v. Oklahoma* (1942) 316 U.S. 535, 536, 537, 62 S.Ct. 1110, 86 L.Ed. 1655. Some of these unequal-

ities were as between larceny and embezzlement, both applying to the same acts and conduct but with different results when different people engaged in them; a chicken thief commits larceny, but a bailee who fraudulently appropriates it is an embezzler; a difference between larceny by fraud and embezzlement; etc. At pp. 538–539. If only a classification of crimes were involved, no question would arise, but “one of the basic civil rights of man” could not be so easily destroyed.

court is able to hear the matter;⁹⁴ the inability of a colored defendant to obtain a jury trial free of discrimination because of the manner in which the jury was chosen; the upholding of a "blue ribbon" jury;⁹⁵ and denouncing prison rules preventing a prisoner from sending out necessary documents to perfect an appeal.⁹⁶

§ 460. Equal Protection and Color—As An Exception—The 1896 Segregation Case—The Doctrine of Separate But Equal

In 1890 Louisiana passed a law providing for "equal but separate accommodations" in railway carriages for whites and Negroes. Plessy was a passenger "between two stations within" Louisiana, alleged he "was seven eighths Caucasian and one eighth African blood," and attacked the statute under the 13th and 14th Amendments. The 13th was irrelevant, but the 14th was held not to ban the segregation. The court pointed to decisions in the states permitting segregation in the schools (e. g., Massachusetts),⁹⁷ forbidding intermarriage (e. g., Indiana), "requiring the separation of the two races in schools, theaters, and railway carriages," and citing also other jurisdictions, including the District of Columbia, which generally followed suit, especially a Mississippi case involving its own statute requiring also "equal, but separate, accommodations for the white and colored races." Since intrastate commerce only was involved, as the railroad "appears to have been purely a local line, with both of its termini within the state," the federal Commerce Clause was inapplicable. Plessy's arguments, upon a variety of other grounds, were also discounted, e. g., "the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is . . . solely because the colored race chooses" so to regard the statute. "The argument also assumes that social prejudices may be overcome by legislation We cannot accept this proposition."⁹⁸

94. *Griffin v. Illinois* (1956) 351 U.S. 12, 16-19, 76 S.Ct. 585, 100 L.Ed. 891.

95. *Strauder v. West Virginia* (1880) 100 U.S. 303, 25 L.Ed. 664; *Ex parte Virginia* (1880) 100 U.S. 339, 25 L.Ed. 676 (Negroes excluded from jury service); *Akins v. Texas* (1945) 325 U.S. 398, 65 S.Ct. 1276, 89 L.Ed. 1692, systematic discrimination not sustained, but in *Cassell v. Texas* (1950) 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839, sustained. The blue ribbon jury is in *Fay v. New York* (1947) 332 U.S. 261, 67 S.Ct. 1613, 91 L.Ed. 2043.

96. *Dowd v. United States ex rel. Cook* (1951) 340 U.S. 206, 71 S.Ct. 262, 95 L.Ed. 215.

97. *Roberts v. Boston* (1849, Mass.) 5 Cush. 198; see also *People ex rel. King v. Gallagher* (1883) 93 N. Y. 438, 45 Am.Rep. 232.

98. *Plessy v. Ferguson* (1896) 163 U.S. 537, 540, 541, 545, 548, 551, 16 S.Ct. 1138, 41 L.Ed. 256. The determination was opposed only by Justice Harlan (Brewer did not participate), who wrote a scathing and denunciatory opinion, insisting that the Constitution was "color-blind,"

It will be noted that interstate transportation was ruled out, for then another question would have arisen;⁹⁹ four years later, however, when Kentucky's like statute was brought up "upon the question whether" it was "an infringement upon the exclusive power of Congress to regulate interstate commerce," the entire court save Harlan also upheld the statute because the state court had construed it as applying only to intrastate commerce or, if not, that it was severable and the statute was now applied properly.¹⁰⁰ But throughout these cases the basic assumption was that the statutory "equal but separate" requirement was not, *per se*, involved in the determination of the classification; or, if the assumption was to the contrary, then the "equal" had been met. It remained for Justice (later Chief Justice) Hughes, in 1914, to particularize the physical-conditions requirement. There Oklahoma's statute was upheld below, and the Justice agreed, *inter alia*, "that it was not an infraction of the 14th Amendment for a state to require separate, but equal, accommodations for the two races." He disagreed, however, with the contention that unless there was a sufficient ticket (economic) demand by Negroes for the plush facilities which the whites were able to afford and receive, then the federal law did not require the railroad to supply these to the few Negroes demanding them.

"It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor; but, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which, under substantially the same circumstances, is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded."¹⁰¹

The "separate but equal" doctrine thus became established by the judicial acceptance of a legislative policy, the classification up-

and that the "thin disguise of 'equal' accommodations" should fool no one.

99. E. g., *Hall v. De Cuir* (1878) 95 U.S. 485, 24 L.Ed. 547, denouncing a Louisiana statute requiring separation because of its impact upon interstate commerce.

100. *Chesapeake & Ohio Ry. Co. v. Kentucky* (1900) 179 U.S. 355, 390, 21 S.Ct. 101, 45 L.Ed. 244.

101. *McCabe v. Atchison, Topeka & Santa Fe Ry. Co.* (1914) 235 U.S. 151, 160, 161-162, 35 S.Ct. 69, 59 L.Ed. 169, although affirming the state court's decision against the complaining Negroes because their allegations were insufficient to grant the relief desired. For another like situation, see *Mitchell v. United States* (1941) 313 U.S. 80, 61 S.Ct. 873, 85 L.Ed. 1201.

on the basis of color alone being upheld where the statute required equal facilities. The judiciary did not discuss this physical requirement at the outset, it being assumed present in fact, but in the 1914 case Justice Hughes made it the basis for the decision. In other words, two items were involved in these "color classification" cases, namely, intrastate transportation, and the quality of the physical facilities; and next the question of the extension of the doctrine from transportation to other fields is involved.

On the commerce question, the courts followed the separate but equal doctrine but restricted it where an undue burden upon the federal power was found, e. g., a Virginia statute requiring segregation on buses was held invalid under the same theory that in 1878 the Supreme Court had invalidated such a statute which required a Mississippi River steamboat to shift passengers back and forth in compliance with local requirements, namely, the resulting undue burden upon interstate commerce;¹⁰² and so, too, where the state's segregation laws required Negroes to change cars during an interstate trip.¹⁰³

Insofar as physical facilities being equal were concerned, the courts followed the doctrine but stressed the factual necessity for equality in not alone the physical facilities, but also the non-physical, e. g., the 1914 decision by Hughes was repeated in 1941, requiring such equality on railroads pursuant to the Interstate Commerce Act requirement which prevented discriminatory practices;¹⁰⁴ and even where the facilities were identical, still, where insufficient accommodations were provided, causing delay in dining car service for Negroes, while seats went begging in the white dining cars, the practice was denounced.¹⁰⁵

The extension of the doctrine to other areas was not as simple as its continuation in transportation, and here the judicial record is noted for its stubborn refusal to extend where any possible (judicial) reason to the contrary could be found. For example, in 1917 the Supreme Court denounced an ordinance which established separate residential districts for Negroes, the reason being that it interfered with the power of alienation (to sell to a Negro property in the white area) and was thus a due process violation, with the state's police power being inapplicable or insufficient;¹⁰⁶ so, too, in 1948, in the Restrictive Covenant case, the Supreme

102. *Morgan v. Virginia* (1946) 328 U.S. 373, 66 S.Ct. 1050, 90 L.Ed. 1317, following the *Hall* case, *supra* note 99.

103. *Chance v. Lambeth* (4th Cir. 1951) 186 F.2d 879, cert. den. (1951) 341 U.S. 941, 71 S.Ct. 1001, 95 L.Ed. 1367, and the following appeal denied, *Atlantic Coast Line R. R. Co. v. Chance* (4th Cir. 1952) 198 F.2d

549, cert. den. (1952) 344 U.S. 877, 73 S.Ct. 172, 97 L.Ed. 679.

104. The *Mitchell* case, *supra* note 101.

105. *Henderson v. United States* (1950) 339 U.S. 816, 70 S.Ct. 843, 94 L.Ed. 1302.

106. *Buchanan v. Warley* (1917) 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149.

Court did not invalidate these where privately made, but held them unenforceable through state action, i. e., through the court's equity powers,¹⁰⁷ and in 1953 extended this holding to prohibit a law suit for damages for the violation of such a restrictive covenant.¹⁰⁸

In the field of lower grade, or public and high school, education the 1896 case had mentioned the Massachusetts segregation law as one such, and apparently had upheld it. Perhaps because of the judicial "equal" requirement, the following year a group of Negro parents sued in Georgia to prevent the collection of a portion of an educational tax; they accepted segregation, were satisfied to pay for primary, intermediate, and grammar schools, but not for high schools; they claimed that the tax was to be used only for white high schools, and that their children could not attend these or equal ones, and had to go to private schools for which the county would allow a certain sum per child. Justice Harlan, who had dissented vigorously in the Plessy case, refused to grant relief because plaintiffs had not contended the segregation was *per se* bad; the consequences of enjoining collection would not be to aid the 60 Negro high school children to get an education, but would prevent 300 Negro children in the primary schools from learning their alphabets; and no Board desire or purpose to discriminate had been shown.¹⁰⁹

In higher education, e. g., law schools and graduate schools, however, somewhat different treatment was shown. For example, Missouri refused to admit a Negro to its state law school, but offered to pay all his expenses at a recognized law school outside the state, as in Kansas, Nebraska, Iowa, or Illinois, which would admit him; it also claimed that by statute it had made provision for a law school for Negroes to be set up as soon as a demand existed for it, but that no Negro, not even the present applicant, had ever so applied. Chief Justice Hughes rejected these contentions, for "The basic consideration is . . . what opportunities Missouri itself furnishes to white students and denies

107. *Shelley v. Kraemer* (1948) 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, and also *Hurd v. Hodge* (1948) 334 U.S. 24, 68 S.Ct. 847, 92 L.Ed. 1187 (District of Columbia, violation of federal public policy and civil rights legislation).

108. *Barrows v. Jackson* (1953) 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586. See, however, the cemetery lot case, *Rice v. Sioux City Memorial Park Cemetery* (1954) 348 U.S. 880, 75 S.Ct. 122, 99 L.Ed. 693, and (1955) 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897, where inconclusive decisions were rendered.

109. *Cumming v. County Board of Education* (1899) 175 U.S. 528, 20 S.Ct. 197, 44 L.Ed. 262. *Gong Lum v. Rice* (1927) 275 U.S. 77, 87, 48 S.Ct. 91, 72 L.Ed. 172 involved a Chinese child who contended a misapplication of the segregation requirement had occurred by classifying him as a Negro; he was denied relief as "the issue is as between white pupils and the pupils of the yellow races," who were deemed also to be colored and therefore within the state's power to classify as such.

to negroes solely upon the ground of color. . . . By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside . . . , and the provision for the payment of tuition fees in another State does not remove the discrimination."¹¹⁰ This judicial view was reiterated in an identical one-law-school situation in 1948,¹¹¹ but suppose separate law schools had been available, what then? In 1946 Texas set up such a separate and physically-equal school, and by the time the case was tried and appealed in 1948, the state court felt that "the new school offered petitioner 'privileges, advantages, and opportunities for the study of law substantially equivalent to those offered . . . ' " to the whites. The Supreme Court, in 1950, disagreed, saying:

"Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close."¹¹²

110. *Missouri ex rel. Gaines v. Canada* (1938) 305 U.S. 337, 349-350, 59 S.Ct. 232, 83 L.Ed. 208. The court dismissed the "limited demand" argument for a law school by citing the *McCabe* case, *supra* note 101; as for the "temporary" argument, that pending the opening of the law school for Negroes this was a temporary situation, the court pointed to the "indefinite period" possible "by reason of the discretion given to the curators." At p. 351.

111. *Sipuel v. Board of Regents* (1948) 332 U.S. 631, 68 S.Ct. 299, 92 L.Ed. 247; see further, on the denial for mandamus to the state,

Fisher v. Hurst (1948) 333 U.S. 147, 68 S.Ct. 389, 92 L.Ed. 604.

112. *Sweatt v. Painter* (1950) 339 U.S. 629, 632, 633-634, 70 S.Ct. 848, 94 L.Ed. 1114. The court also pointed to the necessity, in a law school, for the "interplay of ideas and the exchange of views with which the law is concerned," and that because of this and other reasons, "the education offered petitioner is [not] substantially equal to that which he would receive" in the University school.

Although we have not discussed the "substantially" equal aspect, it may be noted that the "separate but equal" doctrine, insofar as re-

In the non-legal fields of higher education, for example, in the studying for a doctorate in education, and under the requirements of the cases just discussed, Oklahoma had to admit a Negro into its state university,¹¹³ but now the state law required that the instruction was to be "upon a segregated basis." The method was simple: "Thus he was required to sit apart at a designated desk in an anteroom adjoining the classroom; to sit at a designated desk on the mezzanine floor of the library, but not to use the desks in the regular reading room; and to sit at a designated table and to eat at a different time from the other students in the school cafeteria." But after suit was instituted he was "now assigned to a seat in the classroom in a row specified for colored students; he is assigned to a table in the library on the main floor; and he is permitted to eat at the same time in the cafeteria as other students, although here again he is assigned to a special table." Regardless of these changes the Supreme Court reversed, saying:

"The result is that appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.

"Our society grows increasingly complex, and our need for trained leaders increases correspondingly. Appellant's case represents, perhaps, the epitome of that need, for he is attempting to obtain an advanced degree in education, to become, by definition, a leader and trainer of others. Those who will come under his guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training is unequal to that of his classmates. State-imposed restrictions which produce such inequalities cannot be sustained."

§ 461. — Classification and Judicial Determination—The 1954 Desegregation Cases—Aftermath

We have seen that the 1896 Plessy transportation case upheld a color classification, but that the state law there required equal facilities; also, that the "separate but equal" doctrine was not well liked, judicially, and that in transportation, contract claims, and law and graduate education, the courts sought to ameliorate its harshness. The intermediate result, educationally, was that by

lated to physical aspects, cannot be an identical matter; the court's recognition of this fact therefore necessitated the "substantially equal" modification.

¹¹³ *McLaurin v. Oklahoma State Regents* (1950) 339 U.S. 637, 638-639, 70 S.Ct. 851, 94 L.Ed. 1149, a three-judge District Court so holding. The quotations which follow are at pp. 640, 640, and 641.

1950 the Supreme Court had given its imprimatur to a new doctrine, if this may be here suggested, namely, that the public good required all students, at least in the classrooms in the higher echelons, to be able to exchange views, subjected to the same environment, have the benefit of the same teachers, and otherwise be educationally equal non-physically as well as physically. If the public welfare required this for graduate students, whose characters and approaches had assumed somewhat of a "set" nature, how much more important was this for the children in the grade schools, whose character and views were first being formed? Was the national weal limited, hindered, or furthered, regardless of physical and non-physical equality, solely because of the color classification in schools?

In December, 1952 the Supreme Court had these questions argued before it in four cases, each involving Negro children who had been refused outright and unconditioned admission to white public schools; in one case because "the Negro and white [elementary] schools were substantially equal with respect to buildings, transportation, curricula, and educational qualifications of teachers;" in another there was physical inferiority in the elementary and high schools, but immediate equalization was ordered and the Negro children were denied admittance during this program; in a third case inferiority in the high schools was also found, and again equalization was ordered with refusal to admit during this program; and in a fourth case elementary and high school inferiority compelled the granting of the request for immediate admission, with a modification open after an equalization program had been completed.¹¹⁴ Seven months later, June 1953, the matter remained undecided, it was restored to the docket for reargument, and certain questions were propounded to counsel for additional briefing. Five months afterward, exactly a year after the first argument, the matters were re-argued, in December of 1953, and on May 17, 1954 the unanimous decision was handed down. The court, by Chief Justice Warren, felt that in none of the previous cases "was it necessary to re-examine the doctrine [of separate but equal] to grant relief to the Negro plaintiff," and it had been expressly reserved in one of the cases; that now it "is directly presented" and "We must look instead to the effect of segregation itself on public education" where this segregation was based solely upon color and where the physical facilities and other "tangible" factors were equal (at p. 492).

In other words, classification *qua* classification, without the legalistic impedimenta of facilities, etc., to be considered, was now before the court. Was color *per se* a sufficient basis for classifica-

114. *Brown v. Board of Education*
(1954) 347 U.S. 483, 486, fn. 1, 74 S.
Ct. 686, 98 L.Ed. 873.

tion in lower education? The answer was no. Before the reasons are given, the question arises whether the Supreme Court had power to determine this. The answer goes back to 1896, for it was then that the court determined not only that it had the power but, inferentially, that so long as the facilities were equal it would judicially permit color classification; and, further, a coin-face which cropped up in later decisions, that where the facilities were not so, the court would denounce the classification's consequences and the classification itself. In this view the separate-but-equal color classification was a judicial one, even though initiated by state legislatures, for the 1896 Justices were willing to adopt and enforce it under the conditions and circumstances then prevailing. The last phrase is important, for if conditions and circumstances are the basis, then when change occurs factually, then change may occur judicially. Is this a correct approach? The 1896 *Plessy* case, as we have seen, found the Justices calling particular attention to the conditions and circumstances in Massachusetts, Indiana, and elsewhere, to show that they, as Justices, would recognize the existence of these facts and predicate their decision upon them. This is why the 1954 opinion mentions the history of education in the country, into and through the Civil War, and up to 1918 (at p. 489, fn. 4), discloses the Massachusetts elimination of school segregation in 1855 (at p. 491, fn. 6), and then concludes that "In approaching this problem, we cannot turn the clock back to 1868 when the [14th] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." (at pp. 492-493)

In so considering this problem the 1954 court was not doing anything strange, new, or remarkable; phrased differently, the 1954 court was no innovator in judicial circles. It merely took a classification which had theretofore been limited, questioned, and somewhat tarnished by the new developments in education and other fields, and re-examined it in the light of modern conditions; as a matter of law, this classification had been rejected when it conflicted with other constitutional provisions, e. g., the Commerce Clause. The re-examination now began with a basic premise (at p. 493):

"Today, education is . . . required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."

These views had already been enunciated in the Sweatt and McLaurin graduate school (§ 463) cases, and these "considerations apply with added force to children in grade and high schools." (at p. 494) Why? Because

"To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

" 'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.'

"Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.

"We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." ¹¹⁵

But the Supreme Court also had a separate District of Columbia case before it, and as we have seen, no 5th Amendment Equal Protection Clause exists (§ 441). However, under the 5th Due Process Clause, especially in considering "liberty" (§ 392), and also in viewing race classifications with "particular care" (§ 463), and because of the decisions in the other cases, the court concluded that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" to reject such a

115. At pp. 494-495. In fn. 10 the opinion noted that a finding similar to the Kansas one had been made in the Delaware case. The modern psychological authorities were listed in fn. 11.

The court also upheld the suit as one brought as a class action, i. e., by plaintiffs on their own behalf and on behalf of all others similar-

ly situated. The formulation of the decrees (see 347 U.S. 483, 495-496, n. 13) was, however, put off so that the court might have the full assistance of the parties therein. This was then taken under advisement and on May 31, 1955 the decrees were rendered. 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083.

classification, and thus the District of Columbia segregation was denounced.¹¹⁶

The aftermath of these 1954 cases discloses that in all such areas the courts now follow the path of desegregation. The 1954 decree required "a prompt and reasonable start toward full compliance" "with all deliberate speed," so that even with difficulties, political and otherwise, there should be a minimum of an increasing degree of compliance.¹¹⁷ Thus any so-called "massive resistance,"¹¹⁸ or any theory of "interposition," was condemned,¹¹⁹ as was any indirect method of an allegedly private type of educational program.¹²⁰

In other areas desegregation was also enforced, e. g., on municipal golf courses;¹²¹ public bathing beaches;¹²² intrastate buses;¹²³ interstate and intrastate buses;¹²⁴ athletic contests where a state statute required segregation;¹²⁵ city and state parks, as well as public recreational facilities;¹²⁶ public swimming pools;¹²⁷ enjoining a county from renewing or extending a

116. *Bolling v. Sharpe* (1954) 347 U. S. 497, 500, 74 S.Ct. 693, 98 L.Ed. 884.
117. Insofar as graduate schools (e. g., law) are concerned, apparently there is no reason for delay in admitting Negroes. *Florida ex rel. Hawkins v. Board of Control* (1956) 350 U.S. 413, 76 S.Ct. 464, 100 L. Ed. 486.
118. On this see discussion in *James v. Almond* (E.D.Va.1959) 170 F. Supp. 331, 338-339.
119. *Cooper v. Aaron* (1958) 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5; the interposition concept is discussed in *Bush v. Orleans Parish School Board* (E.D.La.1960) 188 F.Supp. 196.
120. *Aaron v. Cooper* (8th Cir. 1958) 261 F.2d 97.
121. *Holmes v. City of Atlanta* (1955) 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed.2d 776, *City of Greensboro v. Simkins* (4th Cir. 1957) 246 F.2d 425; restriction to one day a week bad, *Ward v. City of Miami* (S.D.Fla.1957) 151 F.Supp. 593.
122. *Dawson v. Mayor & City Council* (4th Cir. 1955) 220 F.2d 386, *affd. per curiam* (1955) 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774, *City of St. Petersburg v. Alsup* (5th Cir. 1956) 238 F.2d 830, and *Willie v. Harris County* (S.D.Tex.1962) 202 F.Supp. 549.
123. *Browder v. Gayle* (M.D.Ala. 1956) 142 F.Supp. 707, *affd. per curiam* (1956) 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114.
124. *Bailey v. Patterson* (1962) 369 U.S. 31, 33, 82 S.Ct. 549, 7 L.Ed.2d 512, the court writing that the question "is no longer open." See, for an interstate railroad's waiting room, *Taylor v. Louisiana* (1962) 370 U.S. 154, 82 S.Ct. 1188, 8 L.Ed. 2d 395, and for upholding an I.C.C. order, *Georgia v. U. S.* (1962) — U.S. —, — S.Ct. —, — L.Ed.2d —, *Lassiter v. U. S.* (1962) — U.S. —, — S.Ct. —, — L.Ed.2d —; for a municipal airport's (private) restaurant, see *Turner v. City of Memphis* (1962) 369 U.S. 350, 82 S. Ct. 805, 7 L.Ed.2d 762 (held bad). See also a successful damage suit, *Flemming v. South Carolina Elec. & Gas Co.* (4th Cir. 1955) 224 F.2d 752, *app. dism.* (1956) 351 U.S. 901, 76 S.Ct. 692, 100 L.Ed. 1439.
125. *State Athletic Commission v. Dorsey* (1959) 359 U.S. 533, 79 S. Ct. 1137, 3 L.Ed.2d 1028.
126. *City of Montgomery v. Gilmore* (5th Cir. 1960) 277 F.2d 364; *Department of Conservation & Development v. Tate* (4th Cir. 1956) 231 F.2d 615; *Shuttlesworth v. Gaylord* (N.D.Ala.1961) 202 F.Supp. 59; see also *Fayson v. Beard* (E.D. Tex.1955) 134 F.Supp. 379.
127. *Draper v. City of St. Louis* (E. D.Mo.1950) 92 F.Supp. 546.

lease of a restaurant in a courthouse where the tenant would exclude Negroes;¹²⁸ and Congress even going so far as to amend a statute so as to permit the federal Attorney General to maintain a suit against a board of registrars and others to prevent them from depriving Negroes of their right to vote because of their race.¹²⁹ Private discrimination with respect to restrictive covenants has been discussed, but what of state laws forbidding racial discrimination in the sale or lease of housing, aided in any way by the state or federal governments, including mortgage guarantees?¹³⁰ A Detroit ordinance against discrimination in public housing was upheld,¹³¹ but the State of Washington's anti-discrimination housing law was declared unconstitutional by its state's highest court because the limitation to "publicly assisted" was said to be an unreasonable classification, and thus violated both the federal and state constitutions. The Supreme Court denied certiorari, apparently because of the dual basis, i. e., a federal and a nonfederal ground, for the invalidation.¹³²

§ 462. Equal Protection and Voting—Districting

The Constitution and the Amendments contain several provisions concerning voting,¹³³ and there are several which are limitations upon the states, e. g., race, color, or previous condition of servitude (15th Amendment), sex (19th Amendment), and there is also the 14th Amendment's Equal Protection Clause. However, a poll tax is not a violation of this clause,¹³⁴ nor is a requirement

128. *Plummer v. Casey* (S.D.Tex. 1955) 148 F.Supp. 326, affd. sub. nom. *Derrington v. Plummer* (5th Cir. 1956) 240 F.2d 922, cert. den. (1957) 353 U.S. 924, 77 S.Ct. 680, 1 L.Ed.2d 719. See also § 380, note 40.

129. *United States v. Alabama* (5th Cir. 1959) 267 F.2d 808, holding against such a suit; 42 U.S.C. § 1971(c) thereafter amended; and the case reversed and remanded with instructions to reinstate under the amended section. (1960) 362 U.S. 602, 80 S.Ct. 924, 4 L.Ed. 2d 982. Of course this does not necessarily involve the legal aspects discussed here, but it is in the stream of desegregation.

130. A dozen states have laws such as these, and some, e. g., New York's, are not limited to publicly assisted housing.

131. *Detroit Housing Commission v. Lewis* (6th Cir. 1955) 226 F.2d 180.

132. *Washington State Board Against Discrimination v. O'Meara* (1962) 369 U.S. 839, 82 S.Ct. 896, 7

L.Ed.2d 843, facts and opinion in *O'Meara v. Washington State Board* (1961) 58 Wash.2d 793, 365 P.2d 1. Chief Justice Warren and Justice Stewart felt certiorari should be granted, and the case remanded "to ascertain whether such judgment was based upon a non-federal ground adequate to support it."

133. See, e. g., §§ 120, 147-148, 358, and see concurrence of Justice Douglas in *Baker v. Carr* (1962) 369 U.S. 186, 242-244, 82 S.Ct. 691, 7 L.Ed.2d 663, giving references and citations (omitted here). The parenthetical text references are to the majority opinion.

134. *Breedlove v. Suttles* (1937) 302 U.S. 277, 58 S.Ct. 205, 82 L.Ed. 252; the grandfather clause is bad, e. g., *Gunn v. United States* (1915) 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340, and *Lane v. Wilson* (1939) 307 U.S. 268, 59 S.Ct. 872, 83 L. Ed. 1281. For a proposed amendment, see p. 90, note 7, and p. 115, note 11.

that a person be able to read or write any section of a state's constitution in the English language.¹³⁵ Nevertheless, as Justice Douglas wrote:

"Intrusion of the Federal Government into the election machinery of the States has taken numerous forms—investigations; criminal proceedings; collection of penalties; suits for declaratory relief and for an injunction; suits by the United States under the Civil Rights Act to enjoin discriminatory practices.

"As stated by Judge McLaughlin . . . "The whole thrust of today's legal climate is to end unconstitutional discrimination. It is ludicrous to preclude judicial relief when a mainspring of representative government is impaired. Legislators have no immunity from the Constitution. The legislatures of our land should be made as responsive to the Constitution of the United States as are the citizens who elect the legislators.' "

In other words, "if discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights."¹³⁶ But what about the apportionment of elected officials among the voters who elect them? To 1962 states legislated their own voting districts, whether for purely state or federal, or mixed state-federal, elections, and in some instances disparities in the voting strength between counties, cities, and other election units arose. For example, Tennessee's constitution froze the number of her state Senators and Representatives at 33 and 99 respectively, and then apportioned these among her 95 counties; obviously some method other than county representation was required; this was effected by allocating these officials to election districts, with each district being based upon population; it was provided that decennial reapportionments would occur as the census counts indicated; to 1901 this was done, and the legislature enacted statutes to this effect; since 1901, however, no reapportionment statute was passed; to 1901 the population was largely rural, and so the election districts, and the elected officials, came mostly from, and reflected, rural surroundings and biases; since 1901 the number of eligible voters increased from slightly less than half a million to somewhat more than two million, but in 60 years no reapportionment bill was passed; the reason is obvious, for the population increase was concentrated almost exclusively in the urban areas, and the rural districts even lost somewhat; thus, by 1962, a voter in a rural district could expect his views to be reflected much more so than could his city cousin, and his vote was also "worth" much more; this

135. *Lassiter v. Northampton County Board of Elections* (1959) 360 U. S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072.

136. *Snowden v. Hughes* (1944) 321 U.S. 1, 11, 64 S.Ct. 397, 88 L.Ed. 397.

was a "debasement" of the city votes, but because rural control prevented reapportionment, nothing could be done until the 1962 Reapportionment Case upheld an equal protection argument, i. e., the discrimination against the city voters when no reasonable classification existed.

The Reapportionment Case was procedural, and the merits of the argument were not considered; the suit was instituted as a civil action "to redress the alleged deprivation of federal constitutional rights," (p. 187) based upon the "debasement" of their votes (188) as just indicated, and the plaintiffs claimed this was a denial of equal protection (194). The district court dismissed on the ground of a lack of jurisdiction of the subject matter, and even if there were jurisdiction, then the complaint failed to state a justifiable cause of action (196-197). As to the first reason, the Supreme Court cited and referred to numerous redistricting cases to show jurisdiction did exist (201-204, 231-233); as to the second, the Supreme Court went into the "political question" argument and showed that the cases in this area involved the relations among the three federal departments, not the federal government *vis-a-vis* the states (208-226), and that as to this latter there was no reason why the district court should not proceed with and retain its jurisdiction.¹³⁷ Thus the matter was remanded for a trial on the merits, that is, to permit the plaintiffs to show that there was actual discrimination condemned by the Equal Protection Clause of the 14th Amendment.¹³⁸

§ 463. Equal Protection and Race—Aliens and Citizens

Race has been the basis for many classifications, including eligibility for citizenship and, in a degree, the disabilities and con-

¹³⁷ *Baker v. Carr*, supra note 133, at pp. 228-229. There was a "standing to sue" argument which received scant attention (pp. 204-208); the contention that the equal protection claim was so enmeshed with the Guaranty Clause (republican form of government, Art. IV, § 4) that a nonjusticiable question arose, was rejected, for "we have found that not to be the case here." P. 227, and see also p. 228. On the "political question" aspect, see also § 54, supra.

¹³⁸ There were concurring opinions by Justices Douglas, Clark, and Stewart, with Frankfurter and Harlan (each joining in the other's) dissenting separately. Clark went into great detail on the statistical elements, and Harlan replied; Clark also felt no other recourse to

correct the inequity was available, and Frankfurter (and Harlan) feared the evils the majority decision would spawn would far outweigh those eradicated.

For an additional ruling following the Reapportionment Case, see *Scholle v. Hare* (1962) 369 U.S. 429, 82 S.Ct. 910, 8 L.Ed.2d 1 (Michigan), remanding in the light of the earlier case; see also *W. M. C. A., Inc. v. Simon* (1962) 370 U.S. 190, 82 S.Ct. 1234, 8 L.Ed.2d 430, setting aside lower three-judge decision (S.D.N.Y.1962) 202 F.Supp. 741, and remanding because "a justifiable Federal constitutional cause of action is stated by a claim of arbitrary impairment of votes by means of invidiously discriminatory geographic classification."

sequences which flow therefrom. For example, Congress prevented Chinese for years from becoming naturalized, although native born Americans of non-citizen Chinese parents were constitutionally considered citizens.¹³⁹ An alien may be singled out for special treatment, e. g., deportation,¹⁴⁰ a refusal to grant any constitutional rights to immigrants,¹⁴¹ but a resident alien

"may not be deprived either by the national government or by any state of life, liberty, or property without due process of law. Nor may he be denied the equal protection of the laws. A state was not allowed to exclude an alien from the laundry business because he was a Chinese, nor discharge him from employment because he was not a citizen, nor deprive him of the right to fish because he was a Japanese ineligible to citizenship. An alien's property (provided he is not an enemy alien) may not be taken without just compensation. He is entitled to habeas corpus to test the legality of his restraint, to the protection of the Fifth and Sixth Amendments in criminal trials, and to the right of free speech as guaranteed by the First Amendment.

"An alien, who is assimilated in our society, is treated as a citizen so far as his property and his liberty are concerned. He can live and work here and raise a family, secure in the personal guarantees every resident has and safe from discriminations that might be leveled against him because he was born abroad."¹⁴²

But a difference exists between aliens of other races, and citizens of other races, and the Supreme Court, even while upholding the relocation of Japanese citizens, still felt that "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection."¹⁴³ However, in the 1954 Desegregation Cases, the court did not itself mention citizenship, although its quotation incorporated this term,¹⁴⁴ so that a question of a changed and enlarged scope may arise in the future. For example, and generally, in §§ 456 and 457 we have noted some other types of discrimination, based upon race and nationality, which have

139. *United States v. Wong Kim Ark* (1898) 169 U.S. 649, 18 S.Ct. 456, 42 L.Ed. 890.

140. *Galvan v. Press* (1954) 347 U.S. 522, 529-530, 74 S.Ct. 737, 98 L.Ed. 911, although a plenary power is here involved.

141. *United States ex rel. Knauff v. Shaughnessy* (1950) 338 U.S. 537, 70 S.Ct. 309, 94 L.Ed. 317, again a plenary power being involved.

142. *Harisiades v. Shaughnessy* (1952) 342 U.S. 580, 598-599, 72 S.Ct. 512, 96 L.Ed. 586, per Douglas (Black concurring), dissenting. The opinion footnotes each illustration given.

143. The *Hirabayashi* case, *supra* note 91, at p. 100, and *Endo* in note 92.

144. *Bolling v. Sharpe*, *supra* note 116, at p. 499.

been upheld or denounced, and in § 458 war became a supporter of discrimination based upon race; however, in one situation, we have seen that such a basis was possibly repudiated in the land ownership case.¹⁴⁵

§ 464. Consequences of Invalidation—Equal Protection and Due Process Compared

We have already discussed the difference between Due Process Substantive and Due Process Procedural insofar as the consequences attendant upon their use are concerned (§ 385). These consequences are somewhat analogous with respect to the Equal Protection Clause, but there is no identity. The approach of the late Justice Jackson may be used to point up the reasoning, the differences, and the consequences, when either the Due Process or the Equal Protection Clause is used.

"My philosophy as to the relative readiness with which we should resort to these two clauses is almost diametrically opposed to the philosophy which prevails on this Court. While claims of denial of equal protection are frequently asserted, they are rarely sustained. But the Court frequently uses the due process clause to strike down [state and city] measures

"The burden should rest heavily upon one who would persuade us to use the due process clause to strike down a substantive law or ordinance. Even its provident use against municipal regulations frequently disables all government—state, municipal and federal—from dealing with the conduct in question because the requirement of due process is also applicable to State and Federal Governments. Invalidation of a statute or ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable.

"Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. . . . Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."¹⁴⁶

145. The Terrace case, perhaps repudiated by the Takahashi and Oyama cases, *supra* note 82, as was so held by two states. Namba v. McCourt (1949) 185 Ore. 579, 204

P.2d 569, *Sei Fujii v. California* (1952) 38 Cal.2d 718, 242 P.2d 617.

146. *Railway Express Agency v. New York* (1949) 336 U.S. 106, 111-112, 69 S.Ct. 463, 93 L.Ed. 533.

Justice Jackson wrote before the 1954 Desegregation Case and the 1962 Reapportionment Case, and therefore did not foresee how his pessimism concerning the Equal Protection Clause would become unjustified. Nor did he take into account another distinguishing factor in discrimination, namely, if one classification is denounced the states are (conceivably) free to try another, assuming such a one is available, whereas a denial under substantive due process stops a state regardless of any method of classification or procedure.

§ 465. Limitations Upon Classifications—Constitutional

We have already seen (§ 444) that “A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth.”¹⁴⁷ But there are other provisions of the Constitution and in the Amendments which prevent states and the federal government from classifying in defiance of these clauses. For example, Art. I, § 3, cl. 2 requires Senators to be divided equally into three classes, with elections every two years for each class in succession; Art. I, § 8, cl. 4 grants power to establish “an uniform Rule of Naturalization, and uniform Laws” on bankruptcy; Art. III, § 2, cl. 2 classifies the cases in which the Supreme Court shall have original jurisdiction, which cannot be changed; the 7th Amendment preserves the right to a jury trial in common law suits of over \$20, and this cannot be increased; the 15th Amendment, with the 19th, prevents any classification which impairs the right of federal citizens to vote on the basis of race, color, sex, or previous condition of servitude; and the 16th Amendment permits the taxation of income without apportionment.

§ 466. — Decisional

In § 444 we saw various “rules” by which a classification might be judged, and throughout this Chapter numerous decisions have been likewise cited and discussed; all these indicate how the judiciary, by its own views, limits the state’s ability to classify. For example, the Restrictive Covenant case is an excellent illustration of how the court will not denounce a private agreement, and yet denounce its consequences and prevent its effectuation;¹⁴⁸ or the judicial grant of a nepotic monopoly through upholding a tight classification;¹⁴⁹ or the Desegregation Cases and their aftermath (§§ 460–461). The Supreme Court, in effect, plays an equal protection accordion, with the tune classified as the Justices call it, although it is a judicial, and not purely personal, liking for a particular tune upon which is bottomed the selection.

147. The *Young's Market* case, *supra* note 36.

148. See note 107, *supra*.

149. *Supra* note 37.

CONSTITUTIONAL CLAUSES

Quick Reference Chart

MAY THEY CLAIM BENEFITS OF, OR ARE THEY PROTECTED UNDER:	CITIZENS ¹				ALIENS		CORPS.	
	State vs. State	State vs. Fed.	Fed. vs. State	Fed. vs. Fed.	vs. State	vs. Fed.	vs. State	vs. Fed.
Art. I, §9 Habeas corpus Bill/Attainder Ex post facto §10 Bill/Attainder Ex post facto Impair contracts	N	Y	N	Y	N	Y	N	N
	N	Y	N	Y	N	Y	N	Y
	N	Y	N	Y	N	Y	N	Y
	Y	N	Y	N	Y	N	Y	N
	Y	N ²	Y	N ²	Y	N ²	Y	N ²
Art. III, §2 Jury trials crim.	N	Y	N	Y	N	Y	N	Y
Art. IV, §1 Full Faith & Cred. §2 State cits. P & I	Y	N	Y	N	Y	N	Y	N
	Y	N	N ¹	N	N	N	N	N
AMENDMENTS:								
I. Religion ³								
Speech	Y	Y	Y	Y	Y	Y	Y	Y
Press	Y	Y	Y	Y	Y	Y	Y	Y
Assembly & Pet.	Y	Y	Y	Y	N ⁴	N ⁴	N ⁴	N ⁴
II. Bear Arms								
III. Quartering Soldiers	N	Y	N	Y	N	N	N	N
	Y ⁵	Y	Y ⁵	Y	Y ⁵	Y	Y ⁵	Y

[illegible]

1. Federal citizens (e. g., Dist. of Col.) need not be state citizens; state citizens, however, must first be federal citizens. 14th Amend., § 1, sent. 1.

2. But see Due Process Substantive of 5th Amendment.

3. Portions of Bill of Rights available against states where so indicated.

4. In *Hague v. C. I. O.* (1939) 307 U.S. 496, several opinions could not obtain a majority on this point.

5. Under 14th D. P. Subst.

6. In conjunction with 4th Unreasonable Searches etc.

7. Through 14th D. P. Subst.

8. Through 14th D. P. Proceed., but only as to major cases; however, *Gideon v. Cochran*, set for argument for Oct. 1962 term, may determine whether to extend this to inferior cases.

9. *Robinson v. California* (1962) 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed. 2d 758, holding applicable to states.

10. To a degree, however, through 5th D. P., e. g., *Bolling v. Sharpe* (1954) 347 U.S. 497.

11. Foreign corporations only after admission, interstate commerce excepted, and subject to terms of admission; constitutional rights not waived.

CONSTITUTION OF THE UNITED STATES

(Taken from Senate Committee on the Judiciary, Layman's Guide)

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

ARTICLE I

SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 2. ¹ The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

² No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

³ * [Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.]. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

⁴ When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such vacancies.

⁵ The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

¹ SECTION 3. ** The Senate of the United States shall be composed of two Senators from each State, [chosen by the Legislature] thereof, for six Years; and each Senator shall have one Vote.

² Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the Second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one-third may be chosen every second Year; [and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies].***

* The part included in heavy brackets was repealed by section 2 of amendment XIV.

** The part included in heavy brackets was repealed by section 1 of amendment XVII.

*** The part included in heavy brackets was changed by clause 2 of amendment XVII.

NOTE.—The superior number preceding the paragraphs designates the number of the clause.

³ No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

⁴ The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

⁵ The Senate shall chuse their other Officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the Office of President of the United States.

⁶ The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two-thirds of the Members present.

⁷ Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.

SECTION 4. ¹ The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

² The Congress shall assemble at least once in every Year, and such Meeting shall [be on the first Monday in December,] unless they shall by Law appoint a different Day.*

SECTION 5. ¹ Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

² Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

³ Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

⁴ Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION 6. ¹ The Senators and Representatives shall receive a Compensation for their services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

² No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION 7. ¹ All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

² Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the

* The part included in heavy brackets was changed by section 2 of amendment XX.

United States; if he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

³ Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

² To borrow money on the credit of the United States;

³ To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

⁴ To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

⁵ To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

⁶ To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

⁷ To Establish Post Offices and post Roads;

⁸ To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

⁹ To constitute Tribunals inferior to the supreme Court;

¹⁰ To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

¹¹ To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

¹² To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

¹³ To provide and maintain a Navy;

¹⁴ To make Rules for the Government and Regulation of the land and naval Forces;

¹⁵ To provide for calling forth the Militia to execute the Laws of the Union, suppress insurrections and repel Invasions;

¹⁶ To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

¹⁷ To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

18 To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION 9. 1 The Migration or Importation of Such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

2 The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

3 No Bill of Attainder or ex post facto Law shall be passed.

4 *No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

5 No Tax or Duty shall be laid on Articles exported from any State.

6 No preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State be obliged to enter, clear, or pay Duties in another.

7 No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

8 No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION 10. 1 No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

2 No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

3 No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE II

SECTION 1. 1 The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice-President, chosen for the same Term, be elected, as follows:

2 Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

**[The Electors shall meet in their respective States, and vote by Ballot for two persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all

* See also amendment XVI.

** This paragraph has been superseded by amendment XII.

the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice-President.]

³ The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

⁴ No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

⁵ In case of the removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

⁶ The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

⁷ Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. ¹ The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

² He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

³ The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement

between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

SECTION 2. ¹The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;* between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

²In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

³The trial of all Crimes except in Cases of Impeachment shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION 3. ¹Treason against the United States shall consist only in levying War against them, or, in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

²The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE IV

SECTION 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

SECTION 2. ¹The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

²A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

³**[No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.]

* This clause has been affected by amendment XI.

** This paragraph has been superseded by Amendment XIII.

SECTION 3. 1 New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

2 The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE VI

1 All Debts contracted and Engagements entered into, before the Adoption of this Constitution shall be as valid against the United States under this Constitution, as under the Confederation.

2 This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3 The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

AMENDMENTS

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

AMENDMENT II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects' against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XII

The electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President,

and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. * [And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall Act as President, as in the case of the death or other constitutional disability of the President.]—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

AMENDMENT XIII

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort

* The part included in heavy brackets has been superseded by section 3 of amendment XX.

to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude—

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XVI

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

AMENDMENT XVII

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

[AMENDMENT XVIII]

[SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

[SECTION 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

[SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.]*

AMENDMENT XIX

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

* Amendment XVIII was repealed by section 1 of amendment XXI.

AMENDMENT XX

SECTION 1. The terms of the President and Vice-President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

SECTION 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

SECTION 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice-President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice-President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice-President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice-President shall have qualified.

SECTION 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them and for the case of the death of any of the persons from whom the Senate may choose a Vice-President whenever the right of choice shall have devolved upon them.

SECTION 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

SECTION 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

AMENDMENT XXI

SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

SECTION 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

AMENDMENT XXII

SECTION 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

SECTION 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

AMENDMENT XXIII

SECTION 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

NOTE

The Constitution was ratified by the states as follows:

Delaware	Dec. 7, 1787	Maryland	Apr. 26 (28), 1788
Pennsylvania	Dec. 12, 1787	New Hampshire	June 21, 1788
New Jersey	Dec. 18, 1787	South Carolina	May 23, 1788
Georgia	Jan. 2, 1788	Virginia	June 26, 1788
Connecticut	Jan. 9, 1788	New York	July 26, 1788
Massachusetts	Feb. 6, 1788	North Carolina	Nov. 21, 1789
Rhode Island	May 29, 1790		

The Amendments were proposed and ratified as follows:

Amendment	Proposed	How	Ratified
I-X	Sept. 25, 1789	Congress	Dec. 15, 1791
XI	Mar. 4, 1794	Congress	Feb. 7, 1795
XII	Dec. 8, 1803	Congress	June 15 (July 27), 1804
XIII	Jan. 31, 1865	Congress	Dec. 9, 1865
XIV	June 13, 1866	Congress	July 9 (July 21), 1868
XV	Feb. 26, 1869	Congress	Feb. 3 (Feb. 17), 1870
XVI	July 12, 1909	Congress	Feb. 3, 1913
XVII	May 13, 1912	Congress	May 9, 1913
XVIII	Dec. 18, 1917	Congress	Jan. 16, 1919
XIX	June 4, 1919	Congress	Aug. 18, 1920
XX	Mar. 3, 1932	Congress	Feb. 6, 1933
XXI	Feb. 20, 1933	Congress	Dec. 5, 1933 (By Conventions)
XXII	Jan. 3, 1947	Congress	Mar. 1, 1951
XXIII	Jan. 6, 1960	Congress	Apr. 3, 1961

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